TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 206.

THE CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, PETITIONER,

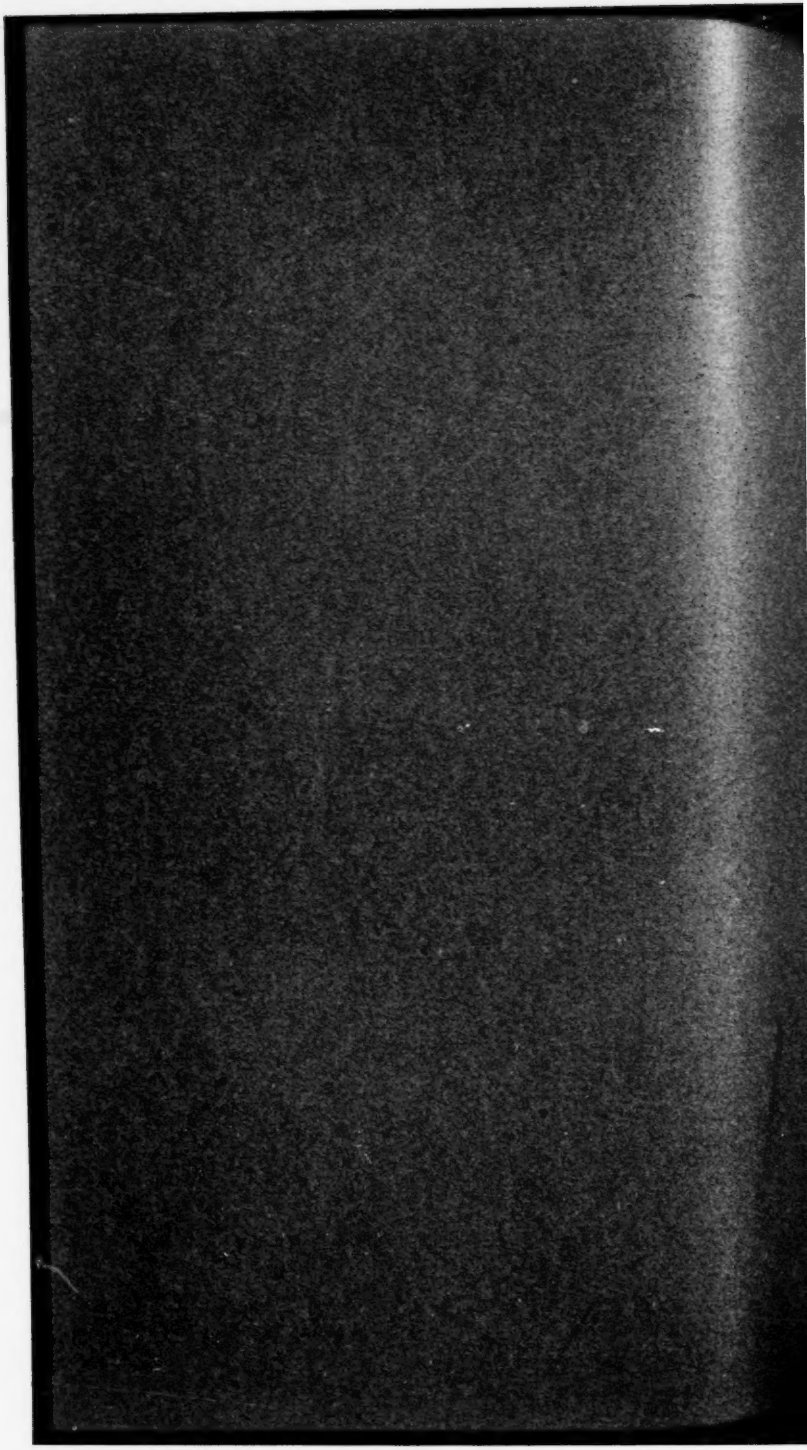
vs.

WILLIAM H. DENSON AND ROSA E. DENSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 7, 1901.
CERTIORARI AND RETURN FILED JANUARY 21, 1902.

(18,345.)



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a *Caption.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held in the court-room of said court, in the city of New Orleans, in the State of Louisiana.

Present and presiding, the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit.

Present also the Honorable A. P. McCormick and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

WILLIAM H. DENSON and ROSA E. DENSON, Appellants,
versus
CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, Appellees. } No. 1028.

Be it remembered, that heretofore, to wit, on the 21st day of January, 1901, a transcript of the record of the above styled and numbered cause from the circuit court of the United States for the southern division of the northern district of Alabama was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit, in the words and figures following, to wit:

1 *Bill of Complaint.*

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION
versus
W. H. DENSON and Wife, ROSA E. DENSON. } No. 109. In Equity.

To the honorable the judges holding the court aforesaid:

Your orator, The Chattanooga National Building and Loan Association, a corporation chartered, organized and doing business under the laws of Tennessee and a citizen of said State, brings this its bill of complaint against W. H. Denson and wife Rosa E. Denson, who are citizens of the State of Alabama, and inhabitants of the southern division of the northern district of Alabama, and avers and charges:

1.

That your orator is a corporation chartered and organized under the statutes of the State of Tennessee, as aforesaid, having its principal office and legal domicile in the city of Chattanooga, Tennessee, and that it is authorized and empowered by its charter to lend its

funds to its stockholders on such terms and conditions and in such manner and under such regulations as may be prescribed by its constitution and by-laws, such loans to be secured by real estate; and in order to determine which one of the stockholders shall receive the loan, where there are a number simultaneously applying for it, your orator's board of directors is authorized by the statutes and the charter aforesaid to loan the funds in the treasury either in open meeting, or by action on written application and bids, at a rate of interest not in conflict with the laws of the State of Tennessee, to the 2 stockholder or stockholders who will bid the highest premium for the privilege of obtaining such loan; the premium so bid to be repaid by the borrower in regular weekly or monthly instalments, not as part of the loan or as interest, but as a means of determining the right, as among competing stockholders, to obtain the loan. Your orator will file a duly authenticated copy of its charter, constitution and by-laws on or before the hearing.

2.

The defendant, W. H. Denson, was on April 25th, 1895, the owner of fifty shares of the stock of your orator, and on the said date he made a written application to your orator's president and board of directors for a loan of $2500 on said stock, and offered a premium of $2500 for the privilege of obtaining said loan. He also offered in said application, to secure said loan and the premium bid by him as aforesaid by a mortgage or deed of trust on the real estate hereinafter described. Said application is now in your orator's possession, and the same will be produced and filed on or before the hearing.

3.

Your orator's board of directors duly considered said application and bid; and there being money in the treasury subject to loan, and the security offered by said Denson having been approved, and the premium bid by him being the highest that was offered for the money desired by him, he became and was entitled to receive said loan, on compliance by him with the stipulations and conditions of his said application and he was so notified. Thereupon on the 10th of June, 1895, your orator advanced or loaned said defendant the sum of $2500, and he executed to your orator his promissory note for the sum of five thousand dollars ($5000) to cover the $2500 loaned him, and the premium bid by him for said loan as aforesaid. Said note is dated and payable at the home office of your orator in Chattanooga, Tennessee, and is due on or before nine years from date; and it recites that it is for money borrowed of your orator on fifty shares of its stock, and that if the maker shall pay promptly the monthly interest on the sum of $2500, and shall pay the monthly dues on his said shares of stock, together with any fines assessed against the same under the rules of the association, until said stock becomes fully paid in and of the value of $100 per share, and shall pay all taxes and insurance premiums on the property conveyed in the mortgage given to secure said note, then upon the surrender of said stock to your ora-

tor said note shall be deemed fully paid and cancelled. But
3 it is further stipulated that if the maker shall fail to pay promptly, when due and payable, the said taxes or insurance premiums, or shall make default in the payment of the monthly interest, fines and monthly payments on said stock, for a period of six months after the same or any instalment thereof is due, then, at the option of your orator, the whole indebtedness evidenced by said note, including any taxes and insurance premiums due or paid by your orator, shall at once become due and collectable, and a foreclosure of said mortgage may be had in the manner therein provided, in which event the maker agrees to pay reasonable attorneys' fees for collecting any amount that may be due. Said note further expressly stipulates that it is made with reference to and under the laws of the State of Tennessee, and that if it shall be paid before seven years from its date, such rebate from the premium included in it will be allowed as your orator's board of directors shall deem equitable. Your orator herewith files said note as Exhibit "A" to this bill, and prays that it may be taken and treated as a part hereof.

4.

To secure the payment of said note the said W. H. Denson and his wife, the defendant Rosa E. Denson, executed to your orator a mortgage conveying certain real estate in the town of Gadsden, Etowah county, Alabama, described as follows: Being the lot on which W. H. Denson now resides, and described as lot No. four (4) according to Pope's map of the city of Gadsden; said lot fronts one hundred and fifty (150) feet on Forrest avenue, and extends back a uniform width a distance of about three hundred and twenty-five (325) feet to Chestnut street, said lot is bounded on the west by W. C. Bellinger's lot, and on the east by W. R. Dortch's lot. Also three lots on Forrest avenue, commencing at the corner of Tenth street and Forrest avenue, and running west one hundred and fifty (150) feet along Forrest avenue; thence running south one hundred and seventy-five (175) feet; thence east one hundred and fifty (150) feet, to Tenth street, thence along with Tenth street to the beginning point. Three lots commencing at the corner of Tenth street and Third avenue and running west one hundred and fifty (150) feet, thence north one hundred and twenty-five (125) feet, thence east one hundred and fifty (150) feet to Tenth street, thence south along Tenth street to the beginning point. Also two lots commencing at the corner of Eleventh street and Third avenue, and running along west with said avenue one hundred and twelve and one-half (112½) feet; thence north to Dr. Thornton's two garden paling-;
4 thence one hundred twelve and one-half (112½) feet to Eleventh street; thence south along said Eleventh street to the beginning point.

It is stipulated in said mortgage that if the said W. H. Denson shall comply with the stipulations in the note aforesaid, till the same shall be paid or cancelled as therein provided, then said mortgage shall be void; but that if default shall be made in the per-

formance of any of said stipulations, a foreclosure of the mortgage may be had by advertisement and sale of the property conveyed, such sale to be for cash in hand and in bar of the equity of redemption, all claim to any right of redemption and to homestead and dower in said lands being expressly waived. The mortgage aforesaid is herewith filed, marked Exhibit "B" and is prayed to be taken and treated as part of this bill.

5.

The defendant Denson has utterly failed and refused to comply with the stipulations and conditions of his note aforesaid, although your orator has repeatedly requested and demanded of him performance of the same. Defendant has paid nothing whatever on said indebtedness for over three years. He paid the dues on his said stock, and the interest on his said loan as stipulated in his said note, for a period of sixteen months, the total payment of dues on said stock amounting to $480. Defendant has failed and refused to keep the property covered by said mortgage insured, and to pay the taxes thereon according to his contract, and your orator has been compelled for its own protection, to pay insurance premiums on said property aggregating $45, and to pay taxes assessed against the same aggregating $223.84, all of which the defendant agreed to pay, and all of which he failed and refused to pay although repeatedly requested to do so. And by the terms and provisions of the note and mortgage aforesaid, the sums so paid out by your orator for insurance, premiums and taxes constitute a part of the indebtedness due from said defendant to your orator, and the repayment of the same is secured by said mortgage.

The defendant now denies and repudiates any obligation on his part either to return to your orator the money borrowed of it by him or to comply with the stipulations of his contracts aforesaid. He asserts the proposition that your orator can neither enforce said contracts nor in any other manner compel him to repay said loan; and he has announced his intention and purpose to enjoin your orator if it shall make any effort to foreclose its mortgage by summary advertisement and sale as therein provided.

5 Your orator some months ago caused the property conveyed by the mortgage aforesaid to be advertised for sale, in foreclosure of the same, on account of the continued default of defendant as aforesaid; whereupon said Denson filed a bill in the chancery court at Gadsden, Alabama, against your orator, averring that said note and mortgage were usurious and void, and that your orator was not entitled to enforce them. It was admitted in the face of said bill that the amount originally loaned said defendant by your orator exceeded all payments that had been made by defendant, both as interest and dues on stock, by the sum of $1820, and that fact that your orator had paid taxes and insurance premiums on said property aggregated nearly $300 for which defendant was liable to it, was in no manner referred to in said bill. Your orator has removed said suit into this court, where it is now pending, and the record therein will be read and referred to as often as may be neces-

sary on the trial of this cause. On account of the filing of said bill, your orator's remedy for foreclosing said mortgage by execution of the power of sale therein given has been greatly embarrassed. On account of the many false allegations, and unsound legal conclusions set up in said bill, your orator's rights under its said mortgage and note were beclouded and the property if sold under the conditions now subsisting, would bring but a small proportion of its value. For these reasons, and in order that the amount due your orator on said note may be fixed by decree in advance of a sale, and in order that it may have an opportunity to bid at the sale of the property and so protect its interests, your orator has elected to foreclose its said mortgage through your honor's court of equity, instead of by exercise of its power of sale, being advised that the remedy afforded it by said power of sale is merely cumulative and does not take away or in any manner interfere with the inherent jurisdiction of a court of equity over the subject-matter.

6.

Your orator has elected in accordance with the option given it in and by the note aforesaid, to treat and declare the entire amount owing to it from defendant W. H. Denson as due and collectable. It avers that the said defendant is justly indebted to it on said note in the sum of $2500, being the amount loaned to him, and the further sum of $2500, being the premium bid by him for the privilege of obtaining said loan, and also for the taxes and insurance premiums paid by it on the property covered by the mortgage aforesaid, and which aggregate, as already hereinbefore stated, the sum
6 of $268.84. Said defendant is entitled to credit for the surrender value of his stock aforesaid, being the sum of $480, the monthly dues on said stock paid by him for the sixteen months immediately following the loan and the profits earned thereon, being the sum of $68.80; but in the event he now withdraws his said stock, defendant is chargeable with a withdrawal fee of $1 per share as provided by the by-laws. Your orator's board of directors has also given defendant credit for one-half the premium bid by him for said loan, under that stipulation in the note which authorizes said board to allow defendant such rebate from the premium as it shall deem equitable, if the loan is repaid before seven years from its date. The defendant is also liable for interest on the $2500 borrowed by him as aforesaid, from the expiration of sixteen months from the date of the loan, he having paid interest thereon only for sixteen months. The total amount due from defendant to your orator, exclusive of interest and costs, is the sum of $3520.04. It is also stipulated by the note and mortgage aforesaid, that in the event of default in the performance by the defendant of the stipulations of his said contract, and a foreclosure of the mortgage on account thereof, said defendant shall pay a reasonable attorney's fee for collecting the amount due on said note. And your orator is advised and charges that under this provision it is entitled to recover a reasonable attorney's fee from defendant, the amount thereof to be fixed by the court, and paid out of the proceeds of the foreclosure sale.

7.

Your orator shows unto your honors that the defendant W. H. Denson is in the possession and enjoyment of said property, and of the rents, profits and income thereof, and that he refuses to apply any part of said rents, profits or income either to the satisfaction of the principal and interest of his said indebtedness to your orator, or to the taxes and insurance premiums thereon which he expressly agreed and stipulated with your orator that he would pay.

Said property is depreciating in value, and has depreciated greatly in value since the mortgage aforesaid was executed; and your orator avers that it is not now adequate and sufficient security for the amount due from defendant on the indebtedness aforesaid. The defendant W. H. Denson is utterly insolvent.

8.

Forasmuch therefore, as your orator is without remedy save in this honorable court of equity, your orator prays:

7 1. That your honors' writ of subpœna issue, directed to defendants, W. H. Denson and wife, Rosa E. Denson, requiring them to appear by a day certain and make defense to this bill; but the answer of the defendants under oath is hereby waived.

2. That a receiver be appointed to take charge of the property embraced in defendants' mortgage, and to receive the rents and profits thereof pending this litigation, and to apply the same to the payment of taxes and insurance on said property and to hold the balance subject to the orders of the court.

3. That all such references may be ordered and accounts taken as may be necessary to ascertain the amount justly due your orator from defendants on the indebtedness aforesaid, and that a decree be rendered for such amount, with interest, attorneys' fees and all costs.

4. That the land described in and conveyed by the mortgage aforesaid be sold under the orders and decrees of the court, on the terms stipulated in said mortgage, to wit: for cash in hand and in bar of the equity of redemption and of homestead and dower, for the payment of the amount ascertained to be due your orator as aforesaid.

5. That all such decrees be pronounced and such conveyances executed under the orders of the court as may be necessary to vest the title to said property in the purchaser, and that all subsequent claims, liens and encumbrances and all right and equi*rt* of redemption in the said premises be forever barred.

6. That your orator may have all such other, further and general relief as the nature of the case may require, and as to your honors may seem right and proper and agreeable to equity.

PRITCHARD & SIZER,
Sol'rs for Complainant.

STATE OF ALABAMA, }
Jefferson County. }

Personally came J. F. Johnston, secretary of The Chattanooga National Building and Loan Association, the within-named complainant, who, being duly sworn, deposes and says that the statements in the foregoing bill, where made of complainant's own knowledge, are true, and those made as on information and belief he believes to be true.

J. F. JOHNSTON.

Sworn to and subscribed before me this 25th day of August, 1899.

N. W. TRIMBLE,
Clerk U. S. Cir. Court.

8 EXHIBIT "A."

$5000.00. CHATTANOOGA, TENNESSEE, *June 10th*, 1895.

On or before nine years from date I promise to pay the Chattanooga National Building and Loan Association, at its home office, Chattanooga, Tennessee, five thousand dollars with interest on the sum of twenty-five hundred dollars, at the rate of six per cent. per annum, payable monthly. This note is for money borrowed on fifty shares of the forty-fourth series of the stock of said association, and is secured by a mortgage or deed of trust of even date herewith upon a lot of land in the county of Etowah, and State of Alabama. Now if I promptly pay the monthly interest on said sum of $2500.00, and the monthly payments on said shares of stock, and any fines assessed under the rules of said association, and the taxes accruing on the lot of land described in the mortgage or deed of trust securing this obligation and the premiums necessary to keep the house on said lot insured in such sum as said association may require, not exceeding ($3000.00) until the said stock becomes fully paid in and of the value of $100 per share, then it is understood that upon the surrender of said stock to said association, this note shall be deemed fully paid and cancelled. But if I fail to pay promptly when due and payable the said taxes and insurance premiums or make default on the payment of said monthly interest, fines and monthly payments on said stock for a period of six months, after the same are or any instalment thereof is due, then, at the option of said association, the whole indebtedness evidenced by this obligation (including any taxes, and insurance premiums due or paid by the association) shall at once become and be due and collectable, and a foreclosure of said mortgage in the manner therein provided may be had, and in that event I agree to pay reasonable attorney's fee or commission charges for collecting any amount that may be due. It is further understood that this note is made with reference to and under the laws of the State of Tennessee and if paid before seven years from its date, such rebate from the premium included herein will be allowed as the board of directors of said association shall deem equitable.

Witness our hand and seal the day and year first above written.
W. H. DENSON. [SEAL.]

(Indorsed:) Filed August 25th, 1899. N. W. Trimble, clerk.
(Indorsed on back:) No. —. Note. W. H. Denson, Gadsden, Ala., to the Chattanooga National Building and Loan Association.

9 EXHIBIT "B."

This indenture made this 10th day of June, A. D. 1895, between W. H. Denson and his wife Rosa E. Denson of the county of Etowah and State of Alabama, of the first part, and the Chattanooga National Building and Loan Association (duly incorporated under the laws of the State of Tennessee, and having its home or principal office at Chattanooga, Tennessee), of the second part.

Witnesseth: That for and in consideration of one dollar in hand paid, and the other considerations hereinafter mentioned and fully set forth, the parties of the first part have bargained and sold, and hereby transfer and convey unto the party of the second part the following-described property, to wit: That certain lot or parcel of land situated in the city of Gadsden, Etowah county, in the State of Alabama, and described as follows: Being the lot on which W. H. Denson now resides and described as lot No. four (4) according to Pope's map of the city of Gadsden; said lot fronts one hundred and fifty (150) feet on Forest avenue, and extends back of uniform width a distance of about three hundred and twenty-five feet (325) to Chestnut street. Said lot is bounded on the west by W. C. Bellinger's lot, and on the east by W. R. Dortch's lot. Also three lots on Forest avenue, commencing at the corner of Tenth street and Forest avenue, and running west one hundred and fifty (150) feet along Forest avenue, then runs south one hundred and seventy-five (175) feet, thence east one hundred and fifty (150) feet to Tenth street, thence along with Tenth street to the beginning point; three lots commencing at the corner of Tenth street and Third avenue, and runs west one hundred and fifty (150) feet, thence north one hundred and twenty-five feet (125) thence east one hundred and fifty (150) feet to Tenth street, thence south along with Tenth street to the beginning point. Also two lots commencing at the corner of Eleventh street and Third avenue, and running west along said avenue one hundred and twelve and a half (112½) feet, thence north to Dr. Thornton's two garden paling-, thence one hundred and twelve and one-half feet to Eleventh street, thence south along said El-venth street to the beginning point.

To have and to hold the same, and all the improvements thereon, and all thereunto belonging and appertaining unto the said second party in fee. The parties of the first part covenant with the said second party that they are lawfully seized of said premises; have
10 good right to convey the same, and that they are unincumbered, and do warrant the title thereto, and bind themselves and their personal representatives forever to defend the same against the lawful claims of all persons.

But this conveyance is in trust, and for the following uses and purposes, that is to say: The said W. H. Denson of the first part is a member of said Chattanooga National Building and Loan Association, and owns fifty shares of the forty-fourth series of stock therein, and has obtained a loan of five thousand dollars thereon, for which he has executed his note or obligation, of even date herewith, payable to the said association at its home office on or before nine years from date, with interest at the rate of six per cent. on the sum of twenty-five hundred dollars, payable monthly, and in which note are the following stipulations and conditions: "Now, if I pay the monthly interest on said sum of twenty-five hundred dollars, and the monthly payments on said shares of stock, and any fines assessed under the rules of said association and the taxes accruing on the lot of land described in the mortgage or deed of trust securing this obligation, and the premiums necessary to keep the house on said lot insured in such sum as said association may require (not exceeding $3000.00) until the said stock becomes fully paid in, and of the value of one hundred dollars per share, then it is understood that upon the surrender of said stock to said association this note shall be deemed fully paid and cancelled. But if I fail to pay promptly when due and payable the said taxes and insurance premiums, or default in the payment of said monthly interest, fines and monthly payments on said stock for a period of six months after the same are, or any installment thereof is due, then, at the option of said association the whole indebtedness evidenced by this obligation (including any taxes and insurance premiums due or paid by said association) shall at once become and be due and collectable, and a foreclosure of said mortgage in the manner therein provided may be had." And in that event I agree to pay reasonable attorney's fee, or commission charges for collecting any amount that may be due.

It is further understood that this note is made with reference to, and under the laws of the State of Tennessee, and if paid before seven years from its date such rebate from the premium included herein will be allowed as the board of directors of said association shall deem equitable.

Now, if the said W. H. Denson shall comply with his undertakings in said obligation till the same be paid or cancelled as therein provided, then this conveyance shall become and be void.

11 But, if default be made in all, or in any one of the particulars mentioned in said note which shall make the same due, then a foreclosure hereof may be had upon the following terms: The second party, by its president or other duly authorized officer or agent shall give notice of the time, place and terms of sale by at least three insertions of an advertisement in some weekly newspaper published in said county of Etowah or if there be no newspaper, by printed hand-bills posted at not less than five conspicuous places in said county, one of which shall be at the court-house door (the said posting or the first publication of said advertisement to be at least twenty days before the day of sale) and on the day fixed, and between the hours of 11 a. m. and 12 m., in front of the door of the

court-house of said county, said officer or agent shall proceed to sell said property at public auction, to the highest bidder for cash in hand and in bar of equity of redemption of the first parties, which is hereby expressly waived and released, and the proceeds apply as follows: (1) To the expenses of sale. (2) To discharge the amount due the second party, and, (3) the residue, if any, will be paid to W. H. Denson, of the first part, or his order. Qualification by the second party under the statute is waived; and the first parties also waive and release all claim to homestead and dower in the property herein described.

This deed is non-negotiable non-transferable and cannot be hypothecated or pledged as collateral security.

In witness of all which, the parties of the first part have hereunto set their hands and seals the day and year first above written.

W. H. DENSON. [SEAL.]
ROSA E. DENSON. [SEAL.]

THE STATE OF ALABAMA, }
Etowah County. }

I, John C. Pugh, notary public, hereby certify that W. H. Denson, whose name is signed to the foregoing conveyance, and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

Given under my hand this the tenth day of June, 1895.

[NOTARIAL SEAL.] JOHN C. PUGH,
Notary Public, Etowah Co., Ala.

THE STATE OF ALABAMA, }
Etowah County. }

I, John C. Pugh, notary public, hereby certify that on this the 10th day of June, 1895, also came before me the within-named Rose E. Denson, known to me to be the wife of the within-named
12 W. H. Denson, who being by me examined separate and apart from her husband, touching her signature to the within conveyance, acknowledged that being informed of the contents she signed the same of her own free will and accord without fear, constraints or threats on the part of her husband. In witness of all of which I hereunto set my hand this the 10th day of June, 1895.

[NOTARIAL SEAL.] JOHN C. PUGH,
Notary Public, Etowah Co., Ala.

Filed August 26th, 1899:

N. W. TRIMBLE, *Clerk.*

(Indorsed:) No. 109. Chattanooga National Building & Loan Association *vs.* W. H. Denson, *et als.* Original bill. Filed August 25th, 1899. N. W. Trimble, clerk.

Subpœna in Equity.

The President of the United States of America to the marshal for the northern district of Alabama, Greeting:

You are hereby commanded to summon W. H. Denson and Rosa E. Denson, his wife, if he be found in your district, that they, laying aside all excuse, appear personally at the office of the clerk of the circuit court of the northern district of the State of Alabama, southern division, in the city of Birmingham, in said district on the rule day, to be held on the first Monday in October, next, to answer, plead or demur to the bill of complaint exhibited in said circuit court by Chattanooga National Building and Loan Association, complainant, against W. H. Denson and Rosa E. Denson, defendants. A copy of which will be furnished on application to the clerk. Herein fail not, and have you then and there this precept, with your return thereon indorsed.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

N. W. TRIMBLE,
Clerk U. S. Circuit Court.

Attest:
[SEAL.]

Issued 25th day of August, 1899.

MEMO.—The defendants are to enter their appearance, and to file their answer or demurrer to said bill, in the clerk's office on
13 or before the day on which this writ is returnable; otherwise a decree *pro confesso* may be entered. The marshal is required to execute this writ twenty days before the return day thereof.

(Indorsed:) No. 109. U. S. circuit court, in chancery. Chattanooga National Building and Loan Association *vs.* W. H. Denson and Rosa E. Denson. Subpœna in equity. Issued August 25th, 1899. Returned and filed August 28th, 1899. N. W. Trimble, clerk. Received in marshal's office this 25th day of Aug., 1899. D. N. Cooper, marshal. Executed this 25th day of Aug., 1899, by handing a copy of same to W. H. Denson and Rosa E. Denson. D. N. Cooper, U. S. M., by A. B. Mitchell, deputy.

Joint and Separate Answer of Defendants to Bill.

In the Circuit Court of the United States, Sitting at Birmingham, Alabama.

CHATTANOOGA NATIONAL BUILDING AND LOAN Association
vs.
W. H. DENSON ET ALS. } No. 109. In Equity.

Come the defendants, W. H. Denson and Rosa E. Denson, and in no manner waiving any right they or either of them may have to

interpose any objection or defense they can make to said bill for its many imperfections and illegalities, by way of motion, demurrer or plea, and file this as their joint and separate answer to complainant's bill.

First.

Defendants, answering the first paragraph of the bill, sayeth: That the averments of said paragraph are but mere opinions and conclusions of the pleader, and fail to set out and allege the facts upon which such conclusions and opinions are drawn and based, and that there are no facts presented by said allegations upon which an issue of fact can be joined between the complainants and the defendants. The defendants not knowing the laws of Tennessee, and not knowing what powers are conferred by the laws of Tennessee in the charter and by-laws of said association, deny each and every averment contained in said first paragraph of the bill, and demand proof of the same.

14 Second.

Defendants, answering the second paragraph of the bill, sayeth: That the averments of the said second paragraph of the bill are but mere opinions and conclusions of the pleader, and do not set out the facts upon which such opinions and conclusions are drawn and based and there are no facts presented by the averments embraced in said paragraph upon which an issue of fact can be joined between the complainant and the defendants. The complainant retains in its possession the instrument of writing which it calls a written application, and fails to set out said instrument in the bill, or attach the same as an exhibit thereto, and thus giving the defendant the opportunity of making a full answer to the said allegations as to its contents. Defendants are therefore prevented from making such answer to such allegations as they otherwise would, and therefore defendants are not required, and are unable to, answer more fully said allegations in said paragraph than they have done, and upon information of facts which defendants believe to be true, they deny each and every averment embraced in the second paragraph of the bill and demand proof of the same.

Defendants deny that on the 25th of April, 1895, the defendant, W. H. Denson, was the owner of fifty shares of stock of the complainant association. No shares of such stock were ever issued and delivered to defendant on the 25th of April, 1895, before or subsequent to said date. Defendant W. H. Denson never had in his possession, and never in his life saw a share, or any part thereof, of the stock of said complainant association, and was never at any time the owner of any shares of stock in said association. Never made any application to complainant to purchase shares of its stock. Defendants further answering sayeth, that on the 25th of April, 1895, in the city of Gadsden, Etowah county, Alabama, and nowhere else, the said complainant association made a proposition to defendant, W. H. Denson, to lend him twenty-five hundred dollars at six per cent. per annum interest thereon, and said defendant, W. H. Denson,

then and there agreed to borrow said sum of money from said association at said rate of interest. As a security for the payment of said sum of money, said association required said defendant, W. H. Denson, to execute a first mortgage on the real estate described in the fourth paragraph of the complainant's bill filed in this case, and that said real estate should be double the value of the amount, $2500.00, to be loaned, which would require the property to be worth $5,000.00; and further required that said real estate should be appraised and valued by a committee appointed by and representing the said association, which appraisement and report was had in this case, and accepted as satisfactory by said association.

Third.

Defendants, answering third paragraph of said bill, say*eth:* The written application referred to in the second paragraph of the bill not being set out in the bill, the defendants are not informed of its contents by the allegations set out in the bill, and are therefore unable to make an answer to the first sentence of the third paragraph of the bill as they otherwise would if said written application was set forth in said bill or attached as an exhibit thereto, and defendants deny each and every averment contained in the first sentence of the third paragraph of the bill and demand proof of the same. Defendants admit that on the 10th day of June, 1895, defendant W. H. Denson, executed the paper mentioned in said third paragraph of the bill.

Defendants most positively deny that on the said tenth day of June, 1895, the complainant loaned defendant, W. H. Denson, $2500.00, on the contrary, defendant only received on that day from complainant twenty-three hundred and seventy-two 50/100 ($2372.50) dollars, and this amount is all the cash said defendant ever received from complainant on the transaction mentioned, or any other transaction.

Defendants admit that while the said promissory note is dated Chattanooga, Tenn., yet the truth is, said note was not executed in Chattanooga; Tennessee, but was executed by said defendant, W. H. Denson, in Gadsden, Etowah county, Alabama, and at no other place, and was delivered by said Denson to said association in said city of Gadsden, and in no other place. Defendant W. H. Denson never had any interview, conversation, agreement or transaction whatever with the complainant association in Chattanooga, Tennessee, as to any matter whatever, and specially as to the transaction set forth and mentioned in the bill. The money paid to said W. H. Denson on said transaction mentioned in the bill was paid to him in the city of Gadsden, Etowah county, Alabama, by the First National Bank of Gadsden, a national bank organized at and doing business in the city of Gadsden aforesaid, and said money was received by him at said bank and paid to him at no other place than in said city of Gadsden.

Defendants further answering, say*eth* that the defendant, W. H. Denson, made different payments on said note and transaction,

amounting in all to six hundred and eighty ($680.00) dollars or more, and each of the said payments was made in the said city of Gadsden, and no other place, and these payments ran through
16 a period of thirteen or more different months. Defendants aver that said association charged defendant W. H. Denson, $42.50, for the month of May, 1895, and the same amount for June, 1895, and the same amount for July, 1895, when in fact, said defendant did not receive any money from said association until the 10th day of June, 1895, and thus said association collected dues and interest from said defendant before he ever received any money from it.

Defendant- further answers said third paragraph of the bill, and say: That the alleged recital in said third paragraph of the bill, "that (the promissory note) is for money borrowed from your orator on fifty shares of stock" is false and untrue, as said defendant, W. H. Denson, was never at any time a stockholder in said complainant association, as is fully shown in defendants' answer to the second paragraph of the bill, which answer is here made part of defendants' answer to this the third paragraph of the bill so far as the allegation relates to the said W. H. Denson being a stockholder in said association.

Defendants, further answering the said third paragraph of the bill, say*eth:* That on the 19th day of June, 1895, the day on which defendant W. H. Denson, executed said promissory note and the said mortgage, the said association, at the same time and as a part of the same transaction, and before the said money was paid over to said defendant W. H. Denson, required said Denson to execute a written instrument showing a surrender of the said number of said 50 shares of stock in said association, to said association, although the said Denson at that time and at no other time ever had in his possession any shares of stock in said association, and no such shares of stock were ever delivered to said Denson, and said Denson never made any application to said complainant to buy any stock, and so far as defendants are informed, and believe to be true, no such shares of stock were ever issued by said association and defendant has never owned any stock in said complainant association.

Fourth.

Defendants, answering the fourth paragraph of the bill, say: If Exhibit "B" is a true and correct copy of the original mortgage and the averments in this paragraph of the bill in relation to the contents thereof are taken from said original mortgage, then the same are true, otherwise the same are false and untrue, and defendants demand proof of the same. Defendants answering say: That said mortgage was signed and executed by them in the city
17 of Gadsden, Etowah county, Alabama, and at no other place, defendants answering say that said mortgage was acknowledged by them in said city of Gadsden, before John C. Pugh, a notary public in and for said county of Etowah, Alabama, and before no other officer.

Fifth.

Defendants, answering the fifth paragraph of the bill, say: It is true W. H. Denson, defendant, had failed to comply with the stipulations and conditions of the said note. The reason he has not done so is apparent; the fact was demonstrated to said Denson, that the more he paid on said debt, it seemed, the larger the debt grew, and he concluded that the converse of the rule might operate, that the less he paid the less the debt would grow. But it seems that said defendant was mistaken and, like the Lerneau hydra, the more you kill the more the increase, the more you pay the greater the debt grows.

Defendants, further answering the fifth paragraph of the bill, say: If it is held that the account between the said association and defendant, W. H. Denson, shall be stated as the basis of a loan of twenty-five hundred dollars instead of the actual cash received on said loan of $2372.50, as heretofore shown, then the account will stand thus:

Amount loaned		$2500.00
	Interest.	Monthly dues.
1895.		
May	12.50	30.00
June	12.50	30.00
July	12.50	30.00
August	12.50	30.00
September	12.50	30.00
October	12.50	30.00
November	12.50	30.00
December	12.50	30.00
1896.		
January	12.50	30.00
February	12.50	30.00
March	12.50	30.00
April	12.50	30.00
May	12.50	30.00
June	12.50	30.00
July	12.50	30.00
August	12.50	30.00
	200.00	480.00
Aggregate payments		680.00
Amount due		1820.00

Defendant states that the foregoing statement is taken from the receipts now in the possession of W. H. Denson, given him by said association, and said payments should be credited on the principal sum loaned. Defendants are not aware of the amount of insurance premiums the complainant has paid, and demands proof of the same.

Defendants, further answering said paragraph, most positively deny that the complainant association has paid $223.84 taxes that have been assessed against the property named in said bill and mortgage, and demand proof of the same. The remaining allegations of the paragraph being merely an argument, and an opinion and conclusion of the pleader and failing to present material facts upon which an issue can be joined, defendants are unable to, and cannot answer said matters as they other(wise) would and could if facts were alleged, and not more arguments, opinions and conclusions of the pleader.

The bill referred to by complainant association, as having been filed by defendant, W. H. Denson, in the chancery court at Gadsden, Alabama, against complainant association, and by said association removed to this, the circuit court of the United States, was dismissed out of said circuit court, on the 4th of September, 1899, by the said circuit court upon the written consent and agreement of said association and defendant W. H. Denson, and said suit is not now pending in said circuit court, and has not been since the 4th of September, 1899.

Sixth.

Defendants, answering the sixth paragraph of the bill, say: The matters stated in said paragraph are peculiarly within the knowledge of the complainant and are not known to the defendants only as stated in said paragraph, defendants do not know that they are true, and they have to trust to complainant, and therefore they demand proof of the same. The note speaks for itself, and is the highest and best evidence of its own terms, obligations and provisions, and so is the said mortgage; copies of both of these instruments purport to be attached to the bill as exhibits, and if they are true copies, defendant- refers to them as full answer to all matters well pleaded in this paragraph of the bill.

19 Seventh.

Defendants admit the allegations embraced in the seventh paragraph of the bill, except the allegation that the property is depreciating in value, and has depreciated in value since the execution of said mortgage, and that said property is inadequate and insufficient security for the amount of the indebtedness and all other demands claimed to be due from defendant W. H. Denson, to said association, and for the payment of which it is claimed said property is liable to pay; and that defendant W. H. Denson is utterly insolvent.

Defendants, jointly severally and separately most positively deny the truth of each and all three of said statements set forth in this paragraph of the bill, and state that each and all of them are wholly and absolutely false and untrue. Defendants aver that said property is not now depreciating, and has not since the execution of said mortgage, depreciated in value; on the contrary, it is appreciating in value, and this appreciation in value is but the natural result of the general prosperity and rise in values that prevails in the mineral regions of Alabama, in which said property is situated. De-

fendants state that it is fairly and reasonably worth six thousand dollars.

Defendant, W. H. Denson, further answering the charge that he is utterly insolvent, states that he is the owner, and in possession in his own right of more property than is necessary to pay the claim of the said complainant ten times. This property consists mostly of real estate in the State of Alabama, and subject to the laws of said State, and to the payment of said defendant's debts, and such real estate is worth more than $2000.00. Such a price would be an exceeding low value for said real estate. Defendant owes but a small amount, compared with the property with which he has to pay. Admitting that the defendant owes the amount which the complainant claims, but defendant denies that he owes complainant such amount, and taking this debt in connection with all other debts due by said defendant, still defendant owns in his own right personal property in Alabama, and subject by the laws of said State to the payment of his debts, which personal property alone is worth more than enough to pay every debt he owes and leave all his real estate untouched.

Defendant, W. H. Denson, furthering answering said bill, says: The transaction and contract between complainant and this defendant was but a borrowing and lending of money, and all the paraphanalia and flummery as to shares and defendant becoming a stockholder in said association, and borrowing money or receiving an advance on said shares, and defendant offering a premium of $2500.00 or any other amount to secure the loan of said money, and the payment of monthly dues on said alleged shares of stock are all and each part and parcel of a cunningly devised scheme and a crafty contrivance by which the complainant could cover up, and hide his usury, and under cover of which complainant proposes to collect more than six per cent. per annum, the legal rate of interest allowed by the laws of Tennessee, for the use and loan of money.

Defendant, W. H. Denson, further answering said bill, says that the said note attached to said bill as an exhibit, and upon which the action is founded, is usurious and void for the interest thereon, under the laws of Alabama. Defendant avers that the amounts set forth in the answer to the fifth paragraph of the bill, as having been paid on said transaction, were made at the dates there stated, and that the same should be credited on the amount of money actually loaned, and applied in no other way, because of the matters and things set forth in this answer as a whole. And the complainant should not be allowed to credit the same on the said alleged stock, as this defendant was never a stockholder, and never had any such stock in his possession, or under his control, and because of the matters and things set forth in this answer as a whole, the complainant should not be allowed to collect more in this suit, from the said defendant, than the amount actually loaned, less all payments made by said defendant.

The said defendant, upon information of facts he believes to be true, *he* says the money was not allotted to him, at a competitive

bidding, but was allowed defendant at a fixed premium or amount, made and established by said association.

Eighth.

Defendants, further answering said bill, say: The complainant association did not lend said money to defendant, W. H. Denson, nor did said Denson borrow said money from said complainant to enable him to secure a home, or to aid defendant in building a dwelling-house for himself and family, and this transaction was outside of, and contrary to the charter of said complainant.

Defendants further answering said bill, aver that any law of Tennessee or any charter or by-law of this association that permits it under any guise, scheme or contrivance to loan money and collect a rate of interest more than six per cent. per annum, which is
21 the legal rate of interest of the State of Tennessee, and prohibits the same power and privilege to other individuals, associations or corporations, is contrary to and in conflict with the equality clause of the fourteenth amendment of the Constitution of the United States, and also contrary to the constitution of the State of Tennessee, which prohibits such inequality, and prohibits any person from being deprived of life, liberty or property without due process of law.

Defendants aver that the laws of the State of Tennessee, under which this association was established and organized permit such privileges and power to such association, and denies the same to all other individuals, associations and corporations, and therefore defendants aver that said laws to this extent are unconstitutional and void.

Ninth.

Defendants further answering said bill say: The complainant is a foreign corporation, and was not organized under the laws of Alabama, that the whole transaction and contracts set out in the bill were commenced and consummated in Gadsden, Etowah county, Alabama, and nowhere else. That the note and mortgage attached to said bill as exhibits, and which are referred to in said bill, and which constitute the basis of the action set forth in said bill, each and doth, was and were executed, acknowledged and delivered to said association in said city of Gadsden, Etowah county, Alabama, and at no other place, the money loaned on said note and mortgage, was paid to and received by defendant, W. H. Denson, at Gadsden aforesaid, and at no other place. That at the time when the transaction was first commenced, and at the time when said note and mortgage were executed, acknowledged and delivered to said association, at the place aforesaid, to wit: on the 10th day of June, 1895, and at the time the said money was paid to and received by the said Denson at the place aforesaid, the said complainant association had not complied with the conditions prescribed by the constitution and statutes of the State of Alabama, by and under which foreign corporations shall do any business in Alabama, which provide that no foreign corporation shall do any business in this State, or engage in,

or transact any business in this State without having at least one known place of business and an authorized agent or agents therein. That at such time and times the complainant association had not filed in the office of the secretary of state of Alabama as required by the statutes of Alabama, an instrument in writing under the seal of said association, and signed officially by the president and
22 secretary of said association, designating one known place of business in Alabama, and an authorized agent or agents residing thereat. And the complainant association had in the month of May and June, 1895, done business in said Gadsden, Etowah county, Alabama, with other parties of like and similar nature as that did with defendant, W. H. Denson, as herein stated in this the ninth paragraph of this answer, and without at such time and times having complied with the requirement of the constitution and statutes of Alabama, in regard to the conditions under which foreign corporations are permitted to do business in Alabama, as herein set forth in this 9th paragraph of this answer.

And defendants having fully answered said bill as they are advised as is necessary, they pray to be discharged hence with their reasonable cost in this behalf expended.

DENSON & TENNER,
Sol'rs for Defendants.

(Indorsed:) No. 109. Chattanooga National B. & L. Association vs. W. H. Denson, *et als.* Answer of defendants. Filed in office Sept. 21st, 1899. N. W. Trimble, clerk U. S. cir. court.

Replication to Answer.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

CHATTANOOGA NATIONAL BUILDING AND LOAN Association
vs.
W. H. DENSON and WIFE.
} No. 109. In Equity.

The above-named complainant, saving and reserving to itself all manner of exception which may be taken to said answer for replication thereto says: That it does aver, maintain and prove its said bill to be true, certain and sufficient in law, and that the answer of the defendants is uncertain, evasive and insufficient in law, without this, that any other matter or thing contained in said answer, material or effectual in the law to be replied to, and not herein sufficiently replied to, conferred, avoided, traversed or denied is untrue, and that the averments and allegations of the complainant's bill are true, all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct; and it humbly prays as in and by its bill it has already prayed.

PRITCHARD & SIZER,
Sol'rs for Compl'ts.

23 (Indorsed:) No. 109. Chattanooga National Building and Loan Association *vs.* W. H. Denson, *et als.* Replication to answer. Filed Nov. 1st, 1899. Chas. J. Allison, clerk.

Stipulations and Exhibits.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

CHATTANOOGA NATIONAL BUILDING AND LOAN Association *vs.* W. H. DENSON and WIFE. } No. 109. In Equity.

In this cause it is stipulated and agreed by and between the complainant and defendant-:

1. That the pamphlet hereto annexed and made Exhibit "A" to this stipulation is a full, true and correct copy of the charter and amendment thereto of the complainant Chattanooga National Building and Loan Association; and that the same may be read and considered in evidence on the trial of this cause as if it were duly authenticated as required by law, the defendants waiving the formal authentication thereof.

2. That the pamphlet filed and marked Exhibit "B" hereto is a full, true and correct copy of the by-laws of the complainant; and that the same may be read and considered as evidence on the trial of this cause as if it were duly and formally authenticated.

3. That J. F. Johnston will testify as follows: That he is the secretary of the Chattanooga National Building and Loan Association and occupied said position at the time the loan to defendant Denson was made, and has continuously occupied the same position up to the present time; that the loan to defendant Denson involved in this suit was negotiated by one, F. H. Kennedy, of Fort Payne, Ala., who was a traveling soliciting agent for the complainant, and whose business it was to solicit subscriptions to stock, and to submit applications for loans from complainant. The applications of defendant Denson for stock in complainant association was forwarded by said soliciting agent to the home office of complainant in Chattanooga, Tenn., and the stock was duly issued and returned to said agent to be by him delivered to defendant Denson. The original application and bid of said Denson for the loan in controversy in this cause was

24 also forwarded to complainant's home office by said Kennedy, and was submitted along with other applications to complainant's board of directors at a stated meeting of said board; and the bid offered by said Denson for said loan, being the highest that was offered for this sum of money and the amount of money desired by said Denson being in the treasury of the association and subject to loan under the provisions of its by-laws, and the security offered by said Denson in his application having been approved, said application was granted and the loan was directed to be made in accordance with the provisions of the charter and by-laws of the complain-

ant association. Thereupon, the note and deed of trust filed as exhibits to complainant's original bill in this cause were prepared at the home office of complainant association, and forwarded to the said Kennedy, through whom the application had been submitted. At the same time a check was sent by complainant association on the Chattanooga National Bank of Tennessee, in favor of defendant W. H. Denson, for the sum of $2,367.50, to D. P. Goodhue of Gadsden, Alabama, with instructions to said Goodhue to deliver said check to defendant upon the execution and delivery of said note and deed of trust. Complainant at that time had no money on deposit in any bank in the city of Gadsden or the State of Alabama, and said check was subsequently presented for payment at the Chattanooga national bank in the city of Chattanooga, Tennessee, and was paid by said bank out of funds on deposit therein belonging to complainant association. At the time this loan was made it was the custom of the complainant association, and was so provided in its by-laws, that three months' dues on the stock of the borrowing members of the association who had not been members of the association and paid dues on their stock for three months prior to the loan, should be deducted from the loan made to such borrowers; and in accordance with that custom and provision there was deducted from the amount of the loan to defendant Denson the sum of $127.50, being three months' dues and interest on the loan, on the fifty shares of stock which had theretofore been subscribed for and issued to him. In addition to this the sum of five dollars was deducted from said loan as an attorney's fee, which was paid to complainant's attorney at its home office for examining and approving the title to the property on which defendant Denson proposed to secure payment of said loan, and for preparing the papers with reference to said loan. At the time the loan to defendant Denson was made, complainant association had been for some time soliciting subscriptions to stock and receiving applications for loans in the State of Alabama, and had paid a tax or license fee required under the laws of the State of Alabama, for foreign corporations proposing to do business in that State, and defendant's officers supposed and understood that the payment of this fee or tax was the only condition with which it was necessary for them to comply in order to be entitled to do business in that State. Subsequently, however, and some months after the loan to defendant Denson was made, complainant was informed by an attorney in the State of Alabama, that the Alabama statutes required foreign corporations doing business in Alabama, to designate a local agent on whom process against the association could be served, and also a local place of business in that State. Thereupon complainant promptly designated such local agent and place of business and continued up to the second of October, 1899, to pay the license tax or fee required of non-resident corporations doing business in Alabama, and to keep a local agent and place of business in that State. Prior to the appointment of such local agent complainant had never done any business in the State of Alabama, except to solicit subscriptions to stock through traveling agents and to receive applications for

loans and, if approved, to grant the same just as was done in the case of defendant Denson. All sums loaned by complainant to citizens or residents of the State of Alabama, were paid through the Chattanooga National Bank of Chattanooga, Tennessee, in the same manner as the loan to defendant Denson was made; and all notes and deeds of trust taken by complainant for loans in Alabama, stated on their face that they were made with reference to, and were to be governed by the laws of the State of Tennessee as in the case of this loan.

The defendant Denson continued for some months to make the payments to defendant on his stock and interest on his loan required by the terms of his note, and there is filed as Exhibit "C" hereto a statement from the books of complainant association showing the dates and amounts of all such payments. Defendant Denson has failed and refused to pay the taxes accruing on the property embraced in and covered by his mortgage or deed of trust to complainant association, and complainant has paid insurance premiums to keep said property insured aggregating $45, and has paid taxes assessed against said property aggregating $223.84, and there is filed herewith as Exhibit "D" a true and correct statement showing the dates and amounts of all such payments of insurance premiums and taxes. The surrender value of the stock owned by defendant Denson in complainant association which was transferred to complainant at the time of said loan was at the time of the filing the original bill in this cause the sum of four hundred and eighty ($480) dollars, being
26 the monthly dues paid by him on said stock, not including the accrued profits thereon; but, since the filing of said bill, the complainant association has become insolvent, and a receiver has been appointed for it in the circuit court of the United States, at Chattanooga, Tennessee, and under the holdings of the supreme court of Tennessee in winding up insolvent building and loan associations, defendant Denson is not entitled to any credit on his loan for the dues paid on all of his stock, but only for that portion thereof which represents the premium bid by him for said loan. In this case one-half of the stock owned by defendant Denson represents the premium bid for his loan, and for the dues paid on this premium stock said defendant is entitled to credit on his loan, but for the dues paid on the remaining half of his stock he is not entitled to be credited on his loan but can only receive his dividends thereon along with the other stockholders of the association. A statement showing the amount for which defendant is entitled to credit on said loan on the basis of settlement between insolvent building and loan associations and borrowing members adopted by the supreme court of Tennessee, and the amount now due from said defendant on the same basis as calculated is herewith filed as Exhibit "E." In calculating the amount due from the defendant to the receiver of complainant association, he is not charged with any premium bid by him for the privilege of obtaining said loan, the supreme court of Tennessee holding that on the insolvency of a building and loan association such premiums cannot be collected, but, on the other hand, defendant is given

credit for all amounts paid by him to complainant association by way of premiums on said loan.

On the second day of October, 1899, one John G. Brown, being the holder of a large amount of paid-up stock in complainant association, filed a general creditors' and stockholders' bill against said association in the circuit court of the United States, for the southern division of the eastern district of Tennessee, under which said James F. Johnston, the secretary of said association was appointed receiver of the same, and a few days later under an ancillary bill filed by the same complainant and against said association in the circuit court of the United States, for the northern division of the northern district of Alabama, the said James F. Johnston was also appointed receiver of all the assets of said association in the State of Alabama. A true copy of the order appointing said receiver made by said Tennessee court is herewith filed as Exhibit "F," and a true copy of his order of appointment by said Alabama court is herewith filed
27 as Exhibit "G," and the defendants waive the formal authentication of said copies.

The foregoing stipulation is to be treated as if formally sworn to by said witness and is to have the same weight on the trial of this cause as if it were the deposition of the said witness Johnston, duly and formally taken.

The defendants, W. H. Denson and Rosa E. Denson agree that the above and foregoing stipulations and exhibits thereto may be used in evidence subject however to all legal exceptions as to the legality, materiality, pertinency and competency of any portion of the same.

DENSON & TANNER,
Sols. for Def'ts.

Nov. 17th, 1899.

EXHIBIT "C."

	Paid.	Int.	Dues.	Total.
May, 1895	6/10/95	12.50	30.00	42.50
June, 1895	6/10/95	12.50	30.00	42.50
July, 1895	6/10/95	12.50	30.00	42.50
Aug., 1895	9/11/95	12.50	30.00	42.50
Sep., 1895	10/15/95	12.50	30.00	42.50
Oct., 1895	11/8/95	12.50	30.00	42.50
Nov., 1895	12/10/95	12.50	30.00	42.50
Dec., 1895	1/16/96	12.50	30.00	42.50
Jan., 1896	2/3/96	12.50	30.00	42.50
Feb., 1896	3/1/96	12.50	30.00	42.50
Mar., 1896	4/14/96	12.50	30.00	42.50
Apr., 1896	5/9/96	12.50	30.00	42.50
May, 1896	7/2/96	12.50	30.00	42.50
June, 1896	8/12/96	12.50	30.00	42.50
July, 1896	8/12/96	12.50	30.00	42.50
Aug., 1896	9/21/96	12.50	30.00	42.50
		$200.00	$480.00	$680.00

EXHIBIT "D."

Sept. 25, 1895. Paid for insurance	25.00
June 22, 1897. Paid for taxes	101.19
July 17, 1897. Paid for taxes	21.20
Oct. 26, 1897. Paid for insurance	20.00
Feb. 21, 1898. Paid for taxes	101.45
	$268.84

28 EXHIBIT "E."

June 19, 1895. To cash	2500.00
June 19, 1895. By 3 mos. prem. $45, 3 mos. int. $27.50	82.50
	2417.50
Oct. 15, 1895. To int.	50.36
	2467.86
Sep. 11th, 1895. By 1 mo. prem. $15, 1 mo. int. 12.50.	
Oct. 15, 1895. By 1 mo. prem. $15, 1 mo. int. 12.50	55.00
	2412.86
Nov. 8, 1895. To int.	9.65
	2422.51
Nov. 8, 1895. By 1 mo. prem. $15, 1 mo. int. 12.50	27.50
	2395.01
Dec. 10, 1895. To int.	11.97
	2406.98
Dec. 10, 1895. By 1 mo. prem. 15.00, 1 mo. int. 12.50	27.50
	2379.48
Jan. 16, 1896. To int.	14.27
	2393.75
Jan. 16, 1896. By 1 mo. prem. 15.00, 1 mo. int. 12.50	27.50
	2366.25
Feb. 3, 1896. To int.	7.09
	2373.34
Feb. 3, 1896. By 1 mo. prem. 15.00, 1 mo. int. 12.50	27.50
	2345.84
Mar. 11, 1896. To int.	14.07
	2359.91

Mar.	11, 1896. By 1 mo. prem. 15.00, 1 mo. int. 12.50.....	27.50
		2332.41
Apr.	15, 1896. To int.	12.82
		2345.26
29 Apr.	15, 1896. By 1 mo. prem. 15.00, 1 mo. int. 12.50 ...	27.50
		2317.73
May	9, 1896. To int.	9.27
		2327.00
May	9, 1896. By 1 mo. prem. 15.00, 1 mo. int. 12.50 ...	27.50
		2299.50
July	2, 1896. To int.....	20.69
		2320.19
July	2, 1896. By 1 mo. prem. 15.00, 1 mo. int. 12.50 ...	27.50
		2292.69
Aug.	12, 1896. To int.....	15.28
		2307.97
Aug.	12, 1896. By 2 mos. prem. 30.00, 2 mos. int. 25.00..	55.00
		2252.97
Sep.	21, 1896. To int.....	14.64
		2267.61
Sep.	21, 1896. By 1 mo. prem. 15.00, 1 mo. int. 12.50 ...	27.50
		2240.11
Nov.	16, 1899. To	423.90
		$2664.01

Mr. Denson is, in addition to the above items, also entitled to share in the assets, along with the other stockholders of the association, on the basis of the $240 paid in on his stock, and the accrued profits thereon.

EXHIBIT "F."

In the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

JOHN G. BROWN
vs.
CHATTANOOGA NATIONAL BUILDING & LOAN ASSOCIATION. } In Equity.

30 *Decree Appointing Receiver.*

This cause coming on for hearing on this the 2nd day of October, 1899, before the Hon. Chas. D. Clark, judge, etc., on the application of the complainant for the appointment of a receiver for the defendant Chattanooga National Building & Loan Association, the complainant being represented by his solicitors, Pritchard & Sizer, and the defendant by its president, J. A. Caldwell, and the said defendant having entered its appearance to the bill, and having waived service of process, and notice of this application, and having made no resistance to the same and the application having been considered and understood by the court:

It is therefore ordered, adjudged and decreed that James F. Johnston be and he is hereby appointed receiver of all the property and assets of the said Chattanooga National Building & Loan Association, wherever located; including real estate, mortgages, notes, accounts, furniture and fixtures, choses in action, and all other property, rights and franchises of every description and kind. He is hereby authorized to take immediate possession of all such property wherever situated or found, and to manage and control the same in such manner as will best preserve and protect it for the benefit of the creditors and stockholders; and he may employ such persons, and make such disbursements as may be needful and proper in so doing. The said receiver is required forthwith to make and file with the clerk of this court a bond in the penalty of ten thousand dollars with good and sufficient security, conditioned to properly perform and discharge his duties as such, and to account for and pay over all moneys coming into his hands according to the orders of court. The receiver is hereby fully authorized and empowered to institute such suits as may be necessary in his judgment for the proper protection of the property, and the collection of the assets of the defendant, and also to come in and assume the prosecution and defense of any and all suits now pending in any court in favor, of or against the said association, the prosecution or defense of which will in his judgment be necessary for the proper protection of the property placed in his charge. All officers, directors, agents and employés of the defendant, and any and all other persons and corporations are hereby required and commanded to turn over to the said receiver any and all property, books, vouchers, deeds, notes, mortgages, stock, bills, accounts, moneys, and all other property or choses

in action, belonging to the defendant association, which may
31 be in their hands or under their control, and all other persons and corporations are hereby enjoined and inhibited during the pendency of this suit from in any manner interfering with the possession, control or management by said receiver of the duties imposed on him as such. The said receiver may make application to the court from time to time for such instructions and authority as he may need or desire in the discharge of his duties, and he will make full report of his action in the premises to the next term of the court. This 2nd day of October, 1899, at 2 o'clock p. m.

(Signed) C. D. CLARK, *Judge, etc.*

EXHIBIT "G."

In the Circuit Court of the United States for the Northern District of Alabama.

JOHN G. BROWN
vs.
CHATTANOOGA NATIONAL BUILDING & LOAN ASSOCIATION. } In Equity.

This day came on to be heard, before the Hon. D. D. Shelby, judge, etc., the ancilliary bill filed by the complainant in the above-styled cause, the court having considered the same, and it appearing that the complainant in said cause has already filed in the circuit court of the United States for the southern division of the eastern district of Tennessee, an original bill, against the above-named defendant, it being a citizen of the State of Tennessee, and a resident of the southern division of the eastern district of Tennessee, and said court having jurisdiction of the complainant and defendant, and the subject-matter involved in said original bill, that in the said original bill the said complainant asked for a receiver for said defendant, for the purpose of protecting its assets and property, and sought to wind up the defendant as an insolvent corporation, and distribute its assets among its stockholders and creditors, and it further appearing in said original cause in said circuit court of the United States for the southern division of the eastern district of Tennessee, the Hon. Chas. D. Clark, judge of the eastern district of Tennessee, and presiding in said circuit court made an order and decree on the 2nd day of October, 1899, granting and sustaining the complainant's application for the appointment of a receiver, and appointing James F. Johnston as receiver of
32 the property of the Chattanooga National Building & Loan Association as fully appears from his order, a certified copy of which is attached to the original bill herein, and it further appearing from said bill that it was the purpose of said court to provide for the preservation and protection of all the property and assets of the defendant, and the said James F. Johnston having duly qualified as receiver under said original bill and having given bond as required in the order appointing him:

It is ordered, adjudged and decreed, that said ancilliary bill be

filed in this court and that this court take ancillary jurisdiction with the said circuit court of the United States, for the southern division of the eastern district of Tennessee, of the cause therein pending, wherein John G. Brown is complainant, and the said Chattanooga Building & Loan Association is defendant, and that the said order of the said Chas. D. Clark, judge, etc., granting the application of the said complainant for the appointment of a receiver, and appointing James F. Johnston as receiver of the defendant, be and the same is hereby ratified and confirmed, and is made the order and decree of this court, and the said James F. Johnston is hereby vested with the same powers, rights and privileges conferred upon him in and by the order and decree of the Hon. Chas. D. Clark, aforesaid, over that portion of the assets and property of the defendant which lies within this district, and within the jurisdiction of this court; and said receiver is hereby authorized to take possession of said property in this district and to act as receiver upon the execution by him of a bond in good security, to be approved by the clerk of this court, in the penalty of ten thousand dollars.

It is further ordered and decreed that all other creditors, stockholders and members of said Chattanooga National Building & Loan Association and all other persons and corporations be enjoined and inhibited from in any manner interfering with the management, possession, and control of any of the property of the defendant within the jurisdiction of this court.

The complainant will cause to be filed in this court certified copies of all orders of a general nature in any way affecting the said property situated within the jurisdiction of this court, which may be made in said original cause by the circuit court of the United States, for the southern division of the eastern district of Tennessee.

This 3rd day of October, 1899.

(Signed) D. D. SHELBY, *Judge, etc.*

33 *Direct and Cross Examination of William H. Denson.*

CHATTANOOGA NATIONAL BUILDING & LOAN Association
vs.
WILLIAM H. DENSON ET AL. } No. 109. In Equity.

Comes WILLIAM H. DENSON, and the complainant named in the interrogatories and in the commission also, and the complainant demanding that the witness be examined orally under rule 67 of the rules of equity practice in the United States courts, and the witness being sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says:

Q. Are you the defendant in this suit?
A. I am.
Q. What relation exists between the defendants in this suit?
A. William H. and Rosa Denson are husband and wife

Q. Did you ever borrow any money from the complainant in this suit?

A. I did borrow money from the association, complainant in this suit.

Q. How much did you make application to borrow?

A. I made application to borrow $2500.

Q. How much cash did you actually receive on said loan?

A. I only received in actual cash $2372.50 on this loan.

Q. Why did you not receive the whole amount you proposed to borrow?

A. The reason given me by the said association for not paying over to me $2500 was that they took out $127.50 for interest as monthly payments, $12.50 per month on $2500 for the months of May, June and July, 1895, making the interest for the three months to be $37.50, also $30.00 per month as monthly payments, making an aggregate for the months of May, June and July, 1895, $90.00.

Q. Have you written evidence of the process of borrowing the money?

A. I have a copy of the instrument which the association calls the written application.

Q. From whom did you procure the said written application?

A. I procured this copy from the association, I made objection to the soliciting agent of the said association, at the time that I signed the said written application, that I was not a stockholder in the association, and the association sent me this copy of said instrument, which is called an application to borrow money.

By Mr. SIZER:

Q. Attach the said written instrument to your deposition, and notify it as "Exhibit A."

By Mr. DENSON: I attach the said copy of the said instru-
34 ment as it was furnished me by the complainant association to my deposition and notify it as "Exhibit A."

Q. Have you done it?

A. I have attached the said written instrument marked for identification as "Exhibit A."

Q. Where did the said negotiation commence?

A. It commenced in my office in Gadsden, Etowah county, Ala.

Q. Where did it continue, where did it consummate?

A. It continued in said office in said city of Gadsden, and was consummated in said office in said city of Gadsden, and nowhere else.

Q. Where did you sign, execute and deliver the original of the said written instrument?

A. I signed and executed the original of "Exhibit A" to this deposition in my office in Gadsden, Etowah Co., Alabama, and delivered the same to the soliciting agent of the complainant association, with whom I had the transaction, in my office in the said city of Gadsden.

Q. On what day did you sign and deliver the said original?

A. I signed and delivered the said original on the 25th day of April, 1895.

Q. Did any part of the negotiation occur in any other State than Alabama?

A. No part of the negotiations occurred in any other State than Alabama, as before stated.

Q. State fully the circumstances under which, and the purposes that induced you to execute said instrument?

A. The circumstances under which I executed the said original were as follows: A gentleman, whose name I cannot now recollect came into my office in Gadsden, and represented himself to be the soliciting agent for the complainant in this cause. He said that he understood that I was desirous of borrowing money. I informed him that such was my desire. He said the complainant would lend to me at six per cent. per annum, with seven years within which to pay it, with twice the value in a real-estate mortgage to secure it. Which real estate should be appraised by two disinterested persons to be selected by the association. I accepted the terms; nothing had been said as to my becoming a stockholder in the complainant association. Said person then presented the original of "Exhibit A" to this deposition. I at once called his attention to the recital in said instrument which stated that I owned fifty shares of the stock on which I desired the loan of $2500. I stated to him that I did not own such stock, did not desire to purchase any stock, and had no money to make such investment; that I wanted to borrow money.

Q. What was the subject-matter, and what the purposes of your making such application?

35 A. The subject-matter of the said application was a loan of money to me by the complainant association, and my borrowing money from it.

Q. If you answer that you executed said instrument on the 25th day of April, 1895, had you ever been prior to that day a stockholder in complainant association?

A. I signed and executed said original instrument a copy of which is Exhibit A to this deposition, on the 25th day of April, 1895. I was not on that day a stockholder in said association, and I had never been prior to that day such stockholder.

Q. Was any share of stock in said association ever issued to you, or to any one for your benefit?

A. If any share of stock in said association was ever issued in my name, or to any one for my use and benefit, I never heard of such issuance, and do not know that there was.

Q. Did you ever have in your possession, or under your control a single or any number of shares of stock in said association?

A. I have no recollection that I ever had in my possession, or under my control a single share or any number of shares of stock in said association.

Q. Did you ever contract with said association to purchase any shares of its stock?

A. I never contracted with the said association to purchase any

share or shares of its stock. If any contract was ever made, the force and effect of which was to make me a stockholder in such association, I was not cognizant of, nor understood that such contract would make me a stockholder, or result in my purchase of a share or shares of stock in such association.

Q. State if you ever attended a meeting of stockholders of said association?

A. I never attended a meeting of the stockholders of the said association.

Q. Were you ever notified of the time or place of meeting of stockholders for the said association?

A. I was never notified of the time or place of any meeting of stockholders of the association.

Q. Were you ever advised, consulted or requested to participate in any meeting in any relation, in any matter in which the said association was concerned or involved?

A. I was never advised, consulted or requested to participate in any meeting or in any relation in any meeting or in any relation in any matter in which said complainant association was concerned or involved.

Q. Were you ever informed or consulted, or did you ever participate in any meeting or conversation which had for its object the consideration of its affairs, or the conduct of the said associa-
36 tion, or election of its officers, or for the consideration of any matter pertaining to the said association?

A. I was never informed or consulted about, or participated in any meeting or conversation that had for its object or purposes the condition or management of the business affairs or conduct of the said association, or the election of any of its officers, or condition in any matter pertaining to said association.

Q. Did you ever participate in the profits earned by said association?

A. I have never participated in the profits earned by the business of the association.

Q. Did you ever receive any dividends as a stockholder or for any purpose in said association?

(A.) I have never received any dividends as a stockholder, or for no other purpose, and in no capacity.

Q. Did you ever have any interview with said association, or did you ever have a communication or communications with the complainant as to the making of the application for the loan of said money in Chattanooga, or in any other place or part in or of the State of Tennessee?

A. I never had any interview with said association, nor held any communication or communications with it, or any of its agents or representatives as to the making the application for the loan of said money in the city of Chattanooga, at any other place or part of the State of Tennessee.

Q. State where all communication or communications commenced, continued and consummated in regard to your making the said application to borrow the said money, and the execution of the said

note (Exhibit A to the original bill) and the execution of the mortgage (a copy of which is attached to the original bill as Exhibit B)?

A. The communication or communications in regard to my making said application to borrow said money from said association each were commenced, continued and consummated in Gadsden, Etowah county, Alabama, and in no other place, and the same is true as to the signing, executing and delivering of the said note which is attached as "Exhibit A" to the original bill, in this case, and the execution of the said mortgage, the original or a copy of which is attached as "Exhibit B" to the original bill.

Q. State where each one of the original instruments were signed, executed, acknowledged and delivered, and by whom they were delivered?

A. Each one of the original instruments, namely, the two original applications were made on the 25th of April, 1895, and the note attached as Exhibit "A" to the original bill, and the original
37 mortgage attached as Exhibit "B," to the original bill, the said note and mortgage being executed on the 10th day of June, 1895, were each signed, executed, acknowledged and delivered to the said soliciting agent of the complainant association, by me in my office, in Gadsden, Etowah county, Alabama.

Q. Were either of them delivered in Chattanooga, Tenn., or in any other place in Tennessee?

A. Neither of said instruments was delivered by me to said association complainant in the city of Chattanooga, Tenn., or any other place in the State of Tennessee.

Q. Was any one of the said instruments signed, executed, acknowledged or delivered in any other place than Gadsden, Alabama?

A. Neither one of the said instruments was signed, executed, acknowledged or delivered in any other place by me, or by any one for me, than at Gadsden, Alabama. I delivered each one of the said instruments to the said soliciting agent of the complainant association, in said city of Gadsden.

Q. Where is the land situated that is embraced in the description in the said mortgage, a copy of which is attached as "Exhibit B" to the original bill?

A. The land described and embraced in the said mortgage, the original, or a copy of which is attached as Exhibit "B" in the original bill, is situated in the city of Gadsden, Etowah county, Alabama.

Q. Are you acquainted with the notary public who took the acknowledgment of the said mortgage?

A. I am acquainted with John C. Pugh, Esq., the notary public who took the acknowledgment of my wife and myself of the said mortgage.

Q. How long have you known him?

A. I have known him from his birth, thirty-two years ago.

Q. Where did he reside at the time he took the acknowledgment?

A. At the time he took the acknowledgment he resided in Gadsden, Etowah county, Alabama.

Q. Under what authority was he executing the authority of a notary public?

A. He was exercising his authority as a notary public at that time under the laws of the State of Alabama.

Q. How do you know this?

A. I know this from having seen and read his commission, as such notary public, long before he took the acknowledgment, and I know that at time he had been acting as such notary public for several years, and was recognized, and considered and employed as such by the general public to perform the duties of such notary public.

Q. Where did you reside at the time of the signing, executing, acknowledging and delivering *to* each and all of the original instruments mentioned in the original bill, and in this deposition and in the interrogatories?

38 A. At the time the defendants to the original bill signed, executed, and acknowledged and delivered each and all of the original instruments mentioned in the original bill, and this deposition and interrogatories, they resided at Gadsden, Alabama.

Q. How long had they resided there?

A. They had resided there prior to that time for about eighteen years.

Q. Where was the money you borrowed in that transaction paid to and received by you?

A. The money borrowed by me in the said transaction was paid to, and received by me in Gadsden, Etowah county, Alabama.

Q. How much money was paid to and received by you in the said transaction?

A. The actual sum paid to and received by me in the said transaction was $2367.50.

Q. Who paid you such money?

A. W. G. Brockway, cashier of the First National Bank of Gadsden, paid the sum of money to me.

Q. State fully the manner and circumstances, and how much money, was paid to and received by you?

A. When I delivered to the soliciting agent of the association the note and mortgage mentioned in the bill and made an exhibit thereto, as "A" and "B," and also mentioned in these interrogatories and deposition, the said soliciting agent of the said association, in my office, in Gadsden, Etowah county, Alabama, delivered to me the check for $2367.50. My best recollection now is, the check was drawn on the First National Bank of Gadsden. I presented the check at the counter of the said bank, and received this amount of money on it.

Q. When and where was the said check delivered to you, and who delivered it?

A. The said soliciting agent of the before-mentioned complainant association delivered to me the said check. It was in my office in Gadsden, Etowah county, Alabama, that the check was delivered to me, in the said office.

Q. Do you know where the said check is?

A. I do not know where the said check is.

Q. Is the check in your possession, or under your control?

A. It is not in my possession, or under my control.

Q. When did you last see the said check?

A. The last time I saw the said check was when I presented it at the counter of the said First National Bank of Gadsden, to be cashed. The said cashier paid me the said cash on the said check, and took it. I have not seen the said check since.

Q. If you have ever paid any money on the said loan, please state where you made such payments, and to whom you made such payments?

A. I made several payments on the said loan, I made each payment to David P. Goodhue, who was the agent of the said
39 association at Gadsden to receive such payments. I made two payments to J. W. Du Bose, who received the payments for Mr. Goodhue, and I made each payment in the city of Gadsden.

Q. How many payments did you make to him, and during what period of time did you make the said payments?

A. Barring three payments which the association took out, to wit: $42.50, for each of the months of May, June and July, 1895, which three payments aggregate $127.50, I have made thirteen other and different payments, of $42.50 each per month, embracing August, 1895, and each other month, to and including August, 1896. These thirteen payments aggregate $552.50 and, including the payments made for the months of May, June and July, 1895, I have paid the association on the said loan $689.

Q. Who was present when you made the said payments to represent the said association?

A. Mr. Goodhue was present, to whom I made the said payments, and he informed me that he was the agent of the association to receive the said payments; I know the association never made any complaint or objection to Mr. Goodhue receiving the said payments, a majority of the payments being made monthly to Goodhue, and the said association informed me more than one time that Mr. Goodhue was its agent for this purpose.

The complainant objects by its solicitor, who comes to say:

"Which of the foregoing statements by the alleged agent of the said association as to his authority to represent and act for it."

Q. Where did he reside at the time of the said payments being made to him, and how long had he resided there prior to such time?

A. Mr. Goodhue resided in Gadsden aforesaid at the time of the said payments being made to him, and he had resided there for twelve or fifteen years.

Q. Where does he reside now?

A. He resides there now.

Q. Did you ever make any payments of the said transaction at Chattanooga, Tenn., or any other place than at Gadsden, Ala.?

A. I never made any payments on the said transaction at Chattanooga, Tenn., or at any other place than at Gadsden, Alabama.

Q. At the time you signed and delivered the said note (Exhibit

"A" to the original bill), and at the time you signed and executed and acknowledged and delivered the said mortgage, the original, or a copy of which is Exhibit "B" to the original bill, did you have in your possession or under your control, any share of stock in the said association?

40 A. At the time I executed and delivered the said note, and at the time that I executed, acknowledged and delivered the mortgage, the original or a copy of which is attached to the original bill, and identified as Exhibit "B," I did not have in my possession or under my control any share or shares of stock in the said association, for the use or benefit of myself or any person whatever.

Q. Have you, at any time before or since the said time, had any share or shares of stock of the said association in your possession or under your control, or subject to your disposal; or did you ever see a share or shares of stock in said association, or have you ever had such in your possession or under your control, or subject to your disposal?

A. I never had at any time, before or since the execution of said mortgage in my possession or under my control, or subject to my disposal any share or shares of stock in the said complainant association; and I have never had at any time or anywhere, seen a share or shares of stock in said association, only at the time when I signed the assignment or surrender of said stock to said association, which is on the back of said certificate of stock.

Q. State for what purpose you borrowed the money?

A. I borrowed it to pay my debts.

Q. Did you borrow it to secure you a home; or did you borrow it to build you a dwelling-house and improve real estate, that you might secure a home for yourself and family?

A. I did not borrow it to secure a home, I did not borrow it to build a dwelling-house, nor to improve real estate, or that I might secure a home for myself and family.

Q. State the character of the improvements on the property mentioned in and described in the mortgage?

A. On the lot on which the dwelling-house is situated there is a two-storied residence containing eight rooms, the four front rooms are 18 x 20 feet each, in area, with a hall between, downstairs; and these four rooms constitute the two-storied part of the house; the other rooms, three of them are 16 x 16 feet in area, one 14 x 16 feet, and are the four back rooms before mentioned, there is a seven-foot veranda to the four front rooms, up and down stairs; there are two verandas to the other four rooms, one running on the side of the single-storied rooms, the veranda in the rear of the said four rooms being built in the shape of an L to the two front two-storied rooms. Over this last veranda there is a platform five feet wide, well covered to connect the kitchen with the rooms in the said house, there is also a bath-room at the west end of this last-named veranda. There is also a two-storied barn on the lot, as well as a carriage-house, all under the same roof; there is also a servants' house, which

41 embraces two rooms with a chimney between, and a porch in front. The whole lot, which embraces an acre and a third

is paled in, and there are palings between the front yard and the back, and between the back yard and the garden. There is water communication with faucets on the premises connected with the house and kitchen. The other lots mentioned in the mortgage are two lots fronting one hundred and twelve feet on Third avenue, and Eleventh street in the city of Gadsden, which are not improved. The other lots six in number front on Forest avenue, and are one hundred and fifty feet, running back a depth of one hundred and seventy-five feet, three of the lots reaching to and adjoining the aforesaid other three lots, which front one hundred and fifty feet on Third avenue, and running back one hundred and twenty-five feet to said three lots fronting on Forest avenue, and ending in the rear of one of the lots which faces Forest avenue, constituting the six lots which are enclosed and improved, without embracing the garden, stables, and some other outhouses and also the lawn in the rear of the yard. Mr. Hertzberg, my son-in-law, uses these six lots as indicated above to live on.

Q. What is a fair and reasonable valuation of said property?

A. A fair and reasonable valuation of said property is six thousand dollars, no less.

Q. Is the said property deteriorating in value?

A. The said property is not deteriorating in value, but is appreciating in value.

Q. How much property did you own at the time you borrowed the said money, and what was its character and value?

A. At the time I borrowed the said money from the said association, property not included in the mortgage, I owned about twenty-five hundred acres of land, this land is mineral land, and is situated in Etowah and De Kalb counties, Alabama, some of the said mineral land is good for agricultural purposes, and a fair valuation of the property at the time I borrowed the said money was $25,000.00.

Q. Do you own said property now?

A. I do own the property at this time. The said mineral lands in De Kalb county, amounting to about 2200 acres, were sold for taxes in 1897, the sale being void under the statute enacted by the last legislature of Alabama, and the statutes of the State under that law of the legislature pronounced the sale void, and the title is still in me, the sale being made by the officers of De Kalb county without giving me any notice whatever of the same, or stating in the said order the year the said taxes were assessed for which the lands were sold to pay.

42 The real estate, including two hundred and forty or two hundred and eighty acres, known as the Brashear place, three hundred and sixty acres lying by and in Will's valley, each in Etowah county, Alabama, fifty-five lots in the town of Attalla, Ala., and the property mentioned. I am as solvent in every respect as a gold dollar, and am willing and able to pay my just debts, and will do so. I have always been known as a debt-paying man, and have property and earning capacity to pay all of my debts.

Q. State if the value of the property embraced in the mortgage was appraised before the association would lend you the money?

A. The value of the property was appraised before the association would lend me the money.

Q. At whose instance was the appraisement made, who appointed the appraisers, to whom did the appraisers make the report of their appraisement; who were the appraisers, where did they reside, and where do they now reside?

A. The appraisement was made at the instance of the association, the association appointed the appraisers so far as I know; I know I never made any appointment myself; they made the report of their appraisement to the association. The soliciting agent of the association and the appraisers themselves, W. L. Echols and T. B. Guinn, informed me that they were the appraisers to appraise the said property; they resided in Gadsden at that time and they reside there now.

Q. How long have they resided at the said place?

A. Of my own knowledge, I know that Echols has resided in Gadsden for twenty-three years, he told me that he was born there, and had been living there for fifty years; Guinn has lived in Gadsden to the best of my recollection for about fifteen years.

Q. What was the value of the said property by the said appraisement?

A. My information is, that they placed the value of said property at five thousand ($5000.00) dollars by their appraisement. The appraisers gave me this information, and so did the said soliciting agent of the association; I have never seen the said valuation in writing.

Q. Where is the report of said appraisement now?

A. I do not know where said appraisement is now.

Q. Has the monthly payments of interest for each month decreased, and has the alleged loan of twenty-five hundred ($2500.00) dollars been decreased by the payments which you have made on the said transaction?

A. I state that the monthly payments of interest to be twelve dollars and fifty cents ($12.50) monthly, and continuing to forty-two dollars and fifty cents ($42.50), up to the time I ceased to make payments on the alleged amount; the aforesaid amount of twenty-
43 five hundred ($2500.00) dollars was not decreased a particle up to the time mentioned. From further statements made to me by the association, in their insistence that I should pay them the said amount, I state that the alleged amount of twenty-five hundred dollars cash loan has not been decreased.

Q. Did you know of any other transaction done or consummated in Gadsden, Etowah county, Alabama, by the association complainant, similar to that consummated with the defendant in this suit?

The solicitor for the complainant waived the answer, and an agreement was entered into as to the residue of the direct examination of Mr. Denson, which agreement was as follows:

Agreement.

It is agreed by the solicitors for the complainant *that* the defendant in this case that the complainant association made three other different and separate loans than the one involved in this suit made to W. H. Denson, in the city of Gadsden, Etowah county, Ala., and on property lying and being in the city of Gadsden, Etowah county, Ala., under the same circumstances and conditions and manner and mode that the said association made the loan involved in this case, and the transaction in this case with the said W. H. Denson. That one of the said loans was made on the 16th day of May, 1895, one on the 30th day of May, 1895, one on the 1st day of June, 1895, and the one to W. H. Denson, involved in this suit was made on the 10th day of June, 1895.

Witnessed by N. W. Trimble.

Cross-examination.

By J. B. SIZER, solicitor for the complainant:

Q. You stated on examination-in-chief that you received the sum of twenty-three hundred seventy-two dollars and fifty cents ($2372.50) on this loan. I will now ask you if it is not a fact that five dollars of this amount was by your instructions and with your consent paid to an attorney at the home office of the association for preparing the papers relative to your loan?

A. My recollection is that there was five dollars reserved out by the association for their home attorney for preparing the papers at Chattanooga.

Q. Is it not a further fact that you were paid the sum of twenty-three hundred and sixty-seven dollars and fifty cents ($2367.50) by a check on the Chattanooga Building and Loan Association on the Chattanooga national bank on this loan?

44 A. I stated that my memory has been refreshed as to the five dollars attorneys' fee in this matter, and it should be added to the one hundred and twenty-seven dollars and fifty cents ($127.50), which I stated in my direct examination was taken out of the twenty-five hundred dollars for the purpose therein stated, which would make the amount of actual cash received on the alleged twenty-five hundred dollars twenty-three hundred and sixty-seven dollars and fifty cents. My mind is not clear as to whether this check was on the First National Bank of Chattanooga, Tenn., or the First National Bank of Gadsden, Ala. I took the check that the soliciting agent of the association told me to present to the First National Bank of Gadsden, Ala., and that I would receive the money on it, and I did so present the said check to the First National Bank of Gadsden, Ala., and William G. Brockway, cashier of the First National Bank of Gadsden, Ala., paid to me twenty-three hundred and sixty-seven dollars and fifty cents ($2467.50) over the counter of the First National Bank of Gadsden, Ala., in the city of Gadsden, Etowah county, Alabama.

Q. Look at the check herewith handed you, and state if it is the check which you received on this loan?

A. Mr. Sizer, presenting me with a check, I recognize it as a check that was delivered to me in my office at Gadsden, Ala., by the aforesaid soliciting agent of the complainant association, and he directed me to present this same check to the First National Bank of Gadsden, Ala., and that the said bank would cash it. I did so present it, and William G. Brockway, the aforesaid cashier of the First National Bank of Gadsden, Alabama, who paid me twenty-three hundred and sixty-seven dollars and fifty cents ($2467 50) over the counter of the said First national bank, in the city of Gadsden, Alabama, the said Brockway took the check from me, and I have never seen it since until today, when it is presented to me by Mr. Sizer.

Mr. SIZER: Please file this check as Exhibit No. "1" to this deposition.

Mr. DENSON: I file it as Exhibit No. "1" to my deposition.

Q. You now see that you were mistaken when you stated on your examination-in-chief that this money was paid to you by a check on the First National Bank of Gadsden, Alabama, do you not?

A. I state that I was mistaken, and that the mistake occurred by the lapse of time, and by the said soliciting agent directing me to present it at the First National Bank of Gadsden, Alabama, for payment.

45 Q. I will now ask you to look at that check, and see if it does not appear by the indorsement on the back of it and by the stamp put by the bank on the face of it that it was forwarded to Chattanooga for collection by the First National Bank of Gadsden, and that it was paid in Chattanooga by the Chattanooga national bank?

A. In answer to this question, I state that I am myself positive that the said soliciting agent of the said complainant association delivered this check to me at my office in Gadsden, Ala., and under his instructions I carried it directly to the First National Bank, of Gadsden, Ala., and the money was there paid to me by William G. Brockway, cashier of the said bank, over the counter of the said national bank, and I told him that the instructions of the said soliciting agent were to present this check at that bank, and I got this identical check then and there cashed, and the said check was not sent by me, or by my authority or for my use or benefit to the First National Bank of Chattanooga, or any other bank for collection. I had no interest whatever in the check after the money was paid me on it.

Q. You knew from the face of the check that it was drawn on the bank in Chattanooga, and that you should have presented it at that bank for payment, did you not?

A. I knew no such thing, because I was instructed by the soliciting agent of complainant to present this identical check to the First National Bank of Gadsden and that the said National Bank of Gads-

den would pay me cash on the check, and this is the reason I presented the check at said bank.

Q. You knew that the check was drawn on the Chattanooga bank, did you not?

A. I did not know it at that time. I do not recollect ever reading the check until this morning, in fact I believed that until it was delivered to me this morning, and I have never read the check, I did not know otherwise but that it was drawn on the First National Bank of Gadsden, Alabama.

Q. If you had read the check at that time, or if you have ever read it, you knew that it was drawn on the Chattanooga bank, did you not?

A. As the question is argumentative, I will answer it argumentatively. Being a graduate of a university, I can read and understand the English language either in printing or writing, and I believe that if I had read the check I would have seen that fact, but I have no recollection of reading it, and do not believe that I had read it, for I have always believed that the check was drawn on the First National Bank of Gadsden, until I saw it in this office this morning and I presented the said check at said Gadsden bank under the instructions from said soliciting agent to be cashed, and as it
46 was cashed without any inquiry, and immediately upon presentation, I had no occasion to examine the check closely.

Q. Now with reference to the one hundred and twenty-seven dollars and fifty cents ($127.50) that was retained out of the twenty-five hundred dollars as interest, for three months on the loan of stock, this money was retained with your knowledge and consent, was it not?

A. ——.

Mr. Ullman, the attorney for defendant, objects, on the ground that no testimony has been offered here showing that the defendant owned, held or controlled any share or shares of stock in the complainant association, and the question is formed with reference to a loan on stock.

A. I state that I never dreamed of any such retention, or heard tell of it until when I went to get the money from Brockway on the check, as I was instructed by the said soliciting agent, and returned immediately to my office where the said soliciting agent was, and asked him why I did not get twenty-five hundred dollars, and he then and there told me it was retained out of the twenty-five hundred dollars for the purpose hereinbefore stated in my direct examination.

Q. When the local agent explained the matter to you, you accepted the twenty-three hundred sixty-seven dollars and fifty cents without protest, did you not?

(A.) In answer to this I will say: I accepted the check, but called the attention of the soliciting agent that I was not a stockholder in said association, and did not intend to become one, I called his attention to it then and there, and denounced it as a great wrong, that I had never been informed, of nor anticipated such a thing. He said "You cannot keep that money unless you consent to this" and

I, in order to get the money said nothing more, but I kept it with a powerful mental reservation of the great wrong by forcing this upon me by what is here stated, that I could not get the money without consenting to it.

Q. Is your recollection very clear on the point that you never made any application for stock in the complainant association?

A. I have no recollection of ever having made any written application whatever and certainly not a verbal application for stock in such association at any time; my best recollection is, that on the day, or somewhere near it, that the said soliciting agent when he handed me this written application for the loan of money on the 25th day of April, 1895, handed me a paper in regard to applying for the stock in the association, but whether I signed it or not, I do not know.

47 Q. Look at the paper herewith handed you, and file it as "Exhibit 2" to your deposition, and state if your signature is appended thereto?

A. I have examined the paper, which I designate as Exhibit No. "2," and my signature in my own handwriting is appended to that paper and bears date the same day, April 25th, 1895, that the said written application, and the same conversation and discussion occurred about this paper as did about the written application for the loan of the money.

Q. Is it not a fact that previous to this application there was issued to you fifty shares of stock in the complainant association?

A. I state in answer to this that if ever any such stock was issued to me, previous to said application, I did not know of it; I never had any information in regard to it, and I never saw such stock, and no such stock was ever delivered to me, nor did I ever have such stock in my possession or under my control.

Q. When the association granted your application for a loan, did you, or not, contract to transfer by written indorsement on the certificate of stock for fifty shares, the application for which has been shown to you, to the complainant association?

A. I do not know positively, my recollection is that I transferred or surrendered some kind of a paper to the said association in relation to the stock, but whether it was a certificate or shares of stock, I cannot remember, as I stated, I have no recollection of having in my possession or under my control any share or shares of stock in said association.

Q. Look at the paper herewith handed you, and file it as Exhibit No. 3 to this deposition, and state if it is not signed by you?

A. The signature to the paper is mine, I wrote the signature myself, and identify the paper, and file it as Exhibit No. "3," to this deposition, this is the paper mentioned in my answer to the said original bill, in which answer I state now that the said paper was the paper surrendered or transferred to the complainant association, the fact that the certificate is printed on the back of the stock had escaped my recollection. I thought it was a separate paper.

Q. Then you were mistaken in the statement made by you in

your examination-in-chief that you had never seen any certificate of stock in the complainant association?

A. Yes, knowing that I had signed the paper mentioned in my answer as surrendering the assignment of stock and not knowing at the time that the assignment was on the back of the stock. I now state that my name, W. H. Denson, is signed on the said cer-
48 tificate by the side of the word "assignee" which is an error, it should have been signed on the blank line above and to the right of the word "assignee" as it appeared on the said assignment.

Q. Look at the paper herewith handed you, and file it as Exhibit No. 4 to your deposition, and state if it is not the application that you made to the complainant association for the loan now in controversy, and state if it is not signed by you?

A. As before stated this is undoubtedly the paper to which I have heretofore referred in my direct examinations as the written application to borrow the said money, and I identify it, and file it as Exhibit No. 4 to my deposition.

Q. You signed the note filed as exhibit to the original bill in this case, did you not?

A. I did, and so stated in my answer to the original bill. In that answer, I admitted the execution of that note.

Q. After you had signed the application filed as Exhibit No. 4 to this deposition, you delivered it to the local agent of the association and he informed you that it would have to be sent to Chattanooga to be approved by the association?

A. I do not know, I have no recollection of any such occurrence.

Q. Do you not recollect that you delivered the application to the local agent?

A. I do, the soliciting agent brought this paper, (Exhibit No. 4) into my office, just as it appears now, with the exception of my signature, he handed it to me, and then occurred my protest, that I was not a stockholder of the company, was not buying stock, had no money to invest in such stock, that I was borrowing money. He said that this was a commercial company, and that I would have to sign that paper with my full Christian name, William H. Denson, I laid it down on my desk and signed.

Q. Now, Mr. Denson, do you not remember that this agent told you, and was it not the understanding from what he had told you before that this application had to be forwarded to Chattanooga, to the association to be approved there by them, before the loan would be made?

A. I have no recollection of that statement by the said agent. He may have stated that or he may not. I do not know.

Q. What is your profession, and how long have you followed it?

A. I am a lawyer by profession, and have been engaged in it for 29 years the first day of October, 1899, and the most vexed question from a legal standpoint that has ever concerned me, is the idea of a man lending another money, and it turns out that he becomes a stockholder in the company, and is expected to pay for shares
49 that he never intended to buy, had no money to buy, did not want and did not care to own.

Q. Have you not been a member of the House of Representatives of the United States?

A. Yes, I was.

Q. For how long, and for how many terms?

(A.) The Fifty-third Congress, two terms.

Q. You stated on your direct examination that you had never received any of the earnings or profits of the complainant association, did you not?

A. Yes.

Q. Now, is it not a fact, that your share of the profits were credited to you on your stock, in the association, and on its books?

A. If any such credits were made, I know nothing of it; I read something in the bill that is filed, but that is the first time I ever heard of it.

Counsel for defendant objects, on the ground that the books kept by the complainant association are not evidence against this defendant, and on the further ground that the other fact appearing there puts in evidence facts sought to be elicited from these interrogatories elsewhere.

Q. I will ask you if it is not a fact that some time before this case was filed you proposed to pay the amount of money borrowed from the complainant association, and the association wrote you accepting your proposition, on the consideration that the settlement was made within thirty days, and that you never replied to their acceptance to your proposition, or made any effort to carry it out?

Counsel for the defendant objects, on the ground that the six hundred dollars was offered as a compromise of this litigation, and was not carried into effect, and that the same is immaterial, and cannot be used as evidence against this defendant.

A. I cannot recollect the terms of any compromise that was proposed; there was some proposal of compromise made afterwards. The complainant association declined to make any compromise.

Q. The money borrowed by you from the complainant association was used to pay off incumbrances on the property covered by the deed of trust on the property now in controversy, and the other debts you owed?

A. Undoubtedly the money was used to pay off my debts.

Q. Is it not a fact that you have failed to keep the insur-
50 ance and taxes on the property paid up, as you contracted to do in the deed of trust which is filed as Exhibit B to the original bill in this suit?

A. I kept the insurance up, until Brother Johnson here, the secretary, began to pout about the expense, and I thought if he could run it cheaper, let him do it. As to the taxes, they were well secured by the property. When I went to pay the taxes the tax collector told me the property had been sold; I looked on the probate judge's record and found it. I went to the judge's offices and found that one Gordon had bought in the property for the complainant association. I knew then that the taxes had been well secured by the

property, and that no injury could result to them by any insurance or taxes, I propose to redeem the property within the next three months.

Q. The reason this property was sold for its taxes was because you had failed to pay the taxes within the time required by law, was it not?

A. If it had not been for the reason stated in that question, the courts of Alabama would have no power to order a sale.

Q. You have, as a matter of fact, paid no taxes on this property since you contracted the debt with the association, have you?

A. Yes; I have paid the taxes during that time.

Q. You have been perfectly solvent, and could have paid these taxes if you had chosen to do so, could you not?

A. I could, unquestionably.

Q. You covenanted in your deed of trust that you would keep up the taxes and insurance costs on the property while this loan was in force, did you not?

A. In answer to this question, I would respectfully ask counsel why he should propound the said inquiry when he has the contract right before him, and is looking at it.

Q. I will ask you to file as Exhibit 5 to this deposition the pass book or receipt book given you by the association, in which is entered the payments made by you on the account of this loan?

A. I will if I can find it. I had such a book, and I desire to use it as evidence myself.

(Signed) W. H. DENSON.

End of examination.

Sworn to and subscribed before me, this 1st day of November, 1899.

N. W. TRIMBLE, *Examiner.*

NOTE.—It was agreed before the examination commenced by the solicitors for the complainant and the defendant and Miss Nora Davis, that the payment for her labor as stenographer was approved by both parties. That by consent of both, her fees are to be paid as part of the court costs.

51	Taking deposition.....	5.00	
	Typewriting the same.....	10.08	
			15.08
Examiner's fees			15.00

I, N. W. Trimble, examiner, duly appointed by said circuit court, hereby certify that the above is the deposition of Wm. H. Denson, in the above-entitled cause, duly taken after due and legal notice, signed in presence of the examiner, and duly sworn to, that counsel for the complainant and the defendant were present at said examination, that Miss Nora Davis, as stenographer and typewriter was duly approved by both parties, and that I am not interested in said suit, or a kin to either party to said suit.

N. W. TRIMBLE, *Examiner.*

The Exhibits Nos. 1, 2, 3 and 4, hereto attached are the original exhibits used on examination, and noted by me.

N. W. TRIMBLE, *Examiner.*

EXHIBIT No. 1.

The Chattanooga National Building & Loan Association.

Loan fund. No. 2040.

CHATTANOOGA, TENN., *June 12th*, 1895.

Pay to the order of W. H. Denson, $2367.50. Twenty-three hundred sixty-seven & 50/100 dollars.

(N. B. C.) J. F. JOHNSTON, *Secretary.*

To the Chattanooga national bank, Chattanooga, Tenn.

Indorsed on left end, on face: Approved by J. A. Caldwell, president.

Stamped on face: "Chattanooga national bank, paid June 21, 1895. Chattanooga, Tenn., exchange department."

Indorsed on back: "W. H. Denson." Stamped on back: "For collection and credit for account of First national bank, Gadsden, Ala., W. G. Brockway, cashier."

Indorsed: "Exhibit No. 1 to deposition of W. H. Denson. N. W. T., examiner."

EXHIBIT No. 2.

No. 1683. Series 44. Chattanooga National Building & Loan Association. Application for stock. Notice, agents are allowed to collect the first month's dues only of sixty cents per share.
52 All other payments must be made to the treasurer of our local boards, or sent direct to the home office. Agents have no authority to make any promises regarding loans, or to bind the association to pay any debts.

I hereby apply to the Chattanooga National Building & Loan Association of Chattanooga, Tenn., for 50 shares of stock. My full name is William H. Denson, and my post-office address is (street and No.) Gadsden, county of Etowah, State of Alabama. My occupation is attorney. My age ——. I will pay my dues at Gadsden branch association.

I hereby agree to abide by the by-laws, rules and regulations of the Chattanooga National Building & Loan Association, and hereby appoint the general attorney of said association to be my proxy, and to vote in my stead upon all shares of stock held by me, or standing in my name, during my absence at any and all meetings. William H. Denson, applicant. This application was taken by me, and the first month's dues were paid to me. —— ——, agent. Dated at —— State of —— this 25th day of April, 1895.

(Indorsed:) Exhibit No. 2 to deposition of W. H. Denson, N. W. T., exam'r.

EXHIBIT No. 3.

Incorporated under the laws of the State of Tennessee.

Number 1683. Series No. 44. (Vignette.) Shares, 50. Amount, $5000.00.

The Chattanooga National Building & Loan Association, of Chattanooga, Tennessee.

This certifies that W. H. Denson, of Gadsden, county of Etowah, State of Alabama, is a member of the Chattanooga National Building and Loan Association, of Chattanooga, Tennessee, and has subscribed for and is the owner of fifty shares of stock therein, payments thereon are due on the last Saturday of each month, beginning on the 25th day of May, A. D. 1895. This certificate is issued to, and is accepted by the holder hereof, upon the conditions named upon the back of this certificate, and the by-laws of the association, which are hereby made a part hereof.

Given under the seal of the Chattanooga National Building
53 & Loan Association, at Chattanooga, Tennessee, this 23rd day of May, A. D. 1895.

[SEAL.]

J. A. CALDWELL, *President.*
J. F. JOHNSTON, *Secretary.*

Shares $100 each.

Conditions Referred to in the Body of This Certificate.

First. The shareholder agrees to pay to this association sixty cents monthly for each share until such share matures, or is withdrawn.

Second. Monthly payments must be paid each month on or before the day of the month stated in within certificate. Payments shall be made at the home office, provided, however, that members in any town may elect a local treasurer and may make payments to him for transmission to the home office. In such cases the local treasurer will be the agent of the members, and not of the association.

Third. Fifty cents of each monthly payment on each share and all fines shall go to the loan fund, the remainder of such payment and all fees shall go into the expense or general fund. No part of the loan fund or interest or profit thereon can be used for expenses of any kind, except for taxes.

Fourth. If any monthly payments are not paid when due, a fine of five cents per share shall be imposed for each month (each or any) payments may be in arrears.

Fifth. Stock in this association is non-forfeitable, but if a monthly payment on any share becomes past due for a period of six months or more such share shall be cancelled. After all arrears and fines are paid the balance due on stock, if any, shall be paid to the owner thereof.

Sixth. Shares in good standing may be transferred on payment to the association of a transfer fee of one dollar. Shares on which loans have been made can be transferred only to a purchaser of the mortgaged property. No transfer is good unless made on the books of the association.

Seventh. At any time this certificate may be returned and a new certificate for a less number of shares issued in lieu thereof. In such case the money paid hereon, except one dollar withdrawal fee for each share so withdrawn, shall be applied to the new certificate, and no more payments shall be required until such money is exhausted.

Eighth. Shareholders may suspend payment (upon the surrender of this certificate), for a period not to exceed six months, and
54 have a new certificate of a later series issued, thus preventing the accumulation of dues and fines. This does not apply to shares of stock borrowed on.

Ninth. If a member dies, his personal representative may withdraw his shares at any time. In no other case can a share be withdrawn until after three months from the date of certificate. If a share is withdrawn at any time before it matures, the member will be entitled to receive a sum of money equal to the amount paid on such shares in monthly payments (less a withdrawal fee of one dollar per share) together with a dividend on such payments at the rate of six per cent. per annum, if withdrawn before two years, and eight per cent. per annum if withdrawn after two years and before four years, and ten per cent. per annum if withdrawn after four years, and before maturity. If a share is matured it may be withdrawn at any time, and the holder thereof will be entitled to receive $100 therefor, together with all additional profits which may have been apportioned to such share. A member desiring to withdraw his share shall be required to give the association thirty days' notice of such intended withdrawal. Unless the consent of the directors is obtained, the association cannot be required to use in payment of withdrawing members in any one month more than one-half as much money as is received into the loan fund during that month.

Tenth. On the first day of January, April, July and October, in each year, the profits arising from interest, premiums, fines and other sources, shall be apportioned among, and set to the credit of all the shares in good standing. Whenever the monthly payments made on any share together with the profits apportioned, and set to the credit of such share, amounts to $100, such share shall be deemed to have matured, and no more monthly payments thereon shall be required. The directors may require any share to be withdrawn at any time after it has matured. If any losses occur they shall be deducted from the undivided profits as far as possible. Any deficiency may be charged against the share in force.

Eleventh. No agent has authority to change this contract in any way, and the association assumes no obligation for any statements not contained in its printed literature.

Assignment.

If you want to sell your stock, fill out this blank, and send this certificate with the transfer fee to the home office.

For value received, I hereby sell, assign, transfer and set over all my right, title and interest in and to the shares of stock mentioned in the within certificate to Chattanooga Nat. B. & L. Association, of Chattanooga, county of Hamilton, State of Tennessee.

(Signed) ——.

Witness:
J. C. PUGH.

Dated this 10 day of June, 1895.

I accept the within shares of stock, and accept and agree to the terms and conditions of the within certificate.

W. H. DENSON, *Assignee.*

N. B.—This certificate of shares must be sent to the secretary with the transfer fee thereof for approval of assignment. Chattanooga, Tenn., —— —, ——. The above assignment is entered upon the books of this association and approved this date. —— ——, secretary.

Endorsed on margin of assignment: "Shareholder No. 1683. Your monthly payment on this certificate amounts to $30.00, which must be paid on or before the last Saturday of each month. Members may make payments in advance."

Withdrawal Receipt.

The within-mentioned shares of stock in the Chattanooga National Building and Loan Association are hereby surrendered, and I hereby acknowledge the receipt of the sum of —— dollars, amount due me by reason of such withdrawal. Dated, —— —, 189–. Witness —— ——, —— —— shareholder. Be sure and notify the home office of any change in your post-office address.

Endorsed on margin of withdrawal receipt: "In writing to the home office be sure to give the number of your certificate."

(Indorsed:) Exhibit No. "3" to deposition of W. H. Denson, N. W. T. exam'r.

EXHIBIT No. "4."

N. B.—Return your certificate of stock with this application.

To the president and board of directors of the Chattanooga National Building and Loan Association, of Chattanooga, Tennessee:

I, Wm. H. Denson, have 50 shares of stock in certificate No. ——, in series No. ——, on which I desire a loan of $2500 cash, and I

offer a premium of $2500, and propose to secure said loan
56 and premium by my mortgage or deed of trust for $5000, upon the following-described real estate situated in the city of Gadsden, county of Etowah, and State of Alabama, to wit: (Here insert a correct description of the land offered as security, copying the same in full from your deed.)

One house and lot in the city of Gadsden, now occupied by me and my family as a home. Situated and fronting on Forest avenue, one hundred and fifty feet, and running back to Chestnut street and fronting on that street one hundred and fifty feet, containing one and one-third acres. There is an alley on the east side the whole length of the lot, it is between the lots of W. G. Bellinger on the west, and W. R. Dortch on the east. The value of this house and lot in these stringent times is six thousand dollars.

Three lots on Forest avenue, commencing at the corner of Tenth street and Forrest avenue, and run west one hundred and fifty feet, along Forrest avenue, then run south one hundred and seventy-five feet, thence east one hundred and fifty feet to Tenth street, thence along Tenth street to beginning point. Three lots commencing at the corner of Tenth street, and Third avenue, and run west one hundred and fifty feet, thence north one hundred and twenty-five feet, thence east one hundred and fifty feet, to Tenth street, thence south along Tenth street to beginning point, being the same conveyed to —— —— by —— —— on the — day of ——, 189–, by deed of record in the —— office of —— county, State of ——, in Book —, page —.

(1.) For what purpose is the money wanted? To remove encumbrances and pay debts. (2.) Of what material is the house built? Wood; foundation, brick; size of main building, 30 feet by 18; height, 2 stories; additions or L's material, ——; size 46 feet by 32; height, one. (3.) How many rooms in the house? Eight and hall and eight closets and bath-room. (4.) When was the house built? In 1883. (5.) Is the house completed? Yes. (6.) If not, when will it be? Recently repaired and in good condition. Is the house painted? Yes. (8.) If not completed, do you guarantee to build it as described above? ——. (9.) What other improvements are there on the premises? Good barn and stables. What is the value of the land exclusive of improvements? Home place, $3000. The other lands mentioned, $3,000.00. The value of the buildings? 3000. (12.) What will the proposed improvements cost? ——. (13.) What will be the total value of the property when proposed improvements are completed? ——. (14.) Is it encumbered by
mortgages or liens or in any other way? Mortgage on home
57 place. (15.) If so, to whom and in what amount? $1500. (16.) How much assurance will you assign? $3000. In whose name is the legal title? Wm. H. Denson. (18.) Are you married? Yes. (19.) Give your wife's (or husband's) name in full. Rosa E. Denson. Will you pay the attorney for investigating the title, and recording fees of deed of trust and other necessary documents? Yes. (21.) What is your post-office address? Gadsden.

(22.) Do you guarantee the answers to the above questions to be true? Yes. Dated this 25th day of April, 1895.

WILLIAM H. DENSON, *Applicant.*

Committee's Report.

(23.) Were you duly authorized by your local board to make this appraisement?

(24.) Have you personally inspected the property above described? Yes.

(25.) What is the land worth exclusive of improvements? $5000.

(26.) What is the value of the buildings thereon? $3000.

(27.) What will the proposed improvements cost?

(28.) What will be the total value when the proposed improvements are completed?

(29.) If the house is not built, have you talked with the builder, and ascertained that the house proposed is to be of the character and value stated by the applicant?

(30.) Do you consider this a good safe loan? Yes.

(31.) What is the occupation of the applicant? Attorney.

We, the undersigned committee, hereby certify that the answers to all of the above questions are true.

T. W. ECHOLS.
T. B. GWIN.

Local Board Report.

The report of the committee as shown above, is accepted by the board of directors of the — branch, and the loan is recommended. The character of the applicant is —. The security is deemed sufficient and safe. This report is ordered to be spread upon our minutes, by order of the board.

—— ——, *President.*

—— ——, *Secretary.*

Attorney's Report.

STATE OF ALABAMA, }
Etowah County. }

58 I hereby certify that I have examined the records of said county, and find the title to the property offered by W. H. Denson as security for loan to be perfect, and vested in W. H. Denson, in fee-simple, with the following exceptions: The judgment of one thousand dollars in favor of Gadsden Land and Improvement Company will have to be paid before the deeds to lots mentioned in abstract is made.

I find that there are no taxes due and unpaid, and no mortgages, trust deeds or liens of any kind against said property except $48 City taxes and mortgage on home place for $1,500 in favor of Thos. Cantrell, said mortgage is not recorded. Denson says there is about

six months' interest due on mortgage. Dated at Gadsden, this 10th day of May, 1895.

GOODHUE & SIBERT,
Local Attorneys.

(Indorsed:) Application No. —. Name, W. H. Denson. P. O., Gadsden. State, ——. Amount cash, $2500. Amount premium, $2500. Total loan, $5000. Certificate No. —. Series No. —. Filed this — day of ——, 189–

(Indorsed:) Exhibit No. "4" to deposition of W. H. Denson. N. W. T. ex'm'r.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

CHATTANOOGA NATIONAL BUILDING AND Loan Association
vs.
W. H. DENSON ET AL.
} No. 109. In Equity.

Affidavit of W. G. Brockway.

Personally came before me, N. L. Green, a notary public, in and for Etowah county, Alabama, William G. Brockway, who being by me duly sworn deposes and says that he is, and has been since the organization, and is now the cashier of the First National Bank of Gadsden, and was such cashier during the whole of the year 1895. That on the 12th day of June, 1895, as such cashier he paid over the counter of said bank in the city of Gadsden, Etowah county, Alabama, the sum of twenty-three hundred and sixty-seven 50/100 dollars to W. H. Denson, on a check drawn by the Chattanooga National B. and L. Association, on a Chattanooga national bank, and in favor of W. H. Denson. My best recollection is, that I paid the money on this check under an understanding with the said
59 building and loan association, and that the Chattanooga national bank on which the check was drawn would pay the same on presentation. After said payment by me, I transmitted the check to our Chattanooga correspondent, and the same was paid. The stamp "For collection, &c.," was not placed there as indicating that said check was to be collected from said Chattanooga bank on account of W. H. Denson, but the money was paid to said Denson as on any other negotiable exchange.

W. G. BROCKWAY.

Sworn to and subscribed before me, this 11th November, 1899.
[OFFICIAL SEAL.]
N. L. GREEN,
Notary Public.

Indorsed: Evidence agreed on by Mr. Sizer.
(Indorsed:) Chattanooga National Building and Loan Association vs. W. H. Denson, *et als.* Affidavit of W. G. Brockway.

Certificate of Secretary of State.

STATE OF TENNESSEE, }
Hamilton County. }

Know all men by these presents, that the Chattanooga National Building and Loan Association, a corporation duly organized under the laws of the State of Tennessee, with its principal place of business in the city of Chattanooga, in said State of Tennessee, do hereby designate the city of Montgomery as its known place of business in the State of Alabama, and does hereby designate and appoint W. B. Davidson as its authorized agent at said place.

Witness the signature of J. A. Caldwell its president, and J. F. Johnston, its secretary, and the corporate seal of said association, this the 7th day of October, 1895.

[SEAL.] J. A. CALDWELL, *President.*
J. F. JOHNSTON, *Secretary.*

STATE OF ALABAMA, }
Office Secretary of State. }

I, Robert P. McDavid, secretary of state of Alabama, hereby certify that the above is a true and correct copy of instrument filed in this office by the Chattanooga National Building and Loan Association, on the 10th day of October, 1895, as the same appears on file and of record in this office.

And I do further certify that the above instrument appears
60 from the records of this office to have been the first and only appointment of an agent by the said corporation under the act of February 28th, 1887.

In testimony whereof I have hereunto set my hand, and affixed the great seal of the State on this 30th day of August, 1899.

[GREAT SEAL.] ROB'T P. McDAVID,
Sect. of State.

(Indorsed:) Certificate of the secretary of state.

Note of the Submission of Defendants for Final Decree.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

CHATTANOOGA NATIONAL BUILDING AND Loan Association
vs.
W. H. DENSON ET AL. } No. 109. In Equity.

September Term, 1900.

Come the respondents, W. H. Denson and Rosa E. Denson, and submit the above-entitled cause for final decree; upon the joint and separate answer of said defendants to the bill; upon the depositions of W. H. Denson; upon an agreement contained in said depositions;

that the complainant had three other transactions similar to that with the respondents to this suit, in the city of Gadsden, and in the same way, and under similar circumstances as that had with said W. H. Denson, and had such transactions in the months of May and June, 1895; upon the affidavit of W. G. Brockway which affidavit is accepted and agreed by the respective counsel, shall be used as evidence in the case. Upon the certified copy of the appointment of an agent, etc., as required by the constitution and statutes of Alabama, by the complainant in this case on the 7th of October, 1895, with the certificate of Rob't P. McDavid under the great seal of the State.

DENSON & TANNER,
Counsel for Respondents.

Filed in office this 12th day of September, 1900.

(Indorsed:) Chattanooga Nat. B. & L. Ass'n *vs.* W. H. Denson, *et al.* Note of the submission of the respondents. Filed in open court this 12th day of September, 1900. Chas. J. Allison, clerk.

61 *Decree.*

CHATTANOOGA NAT'L B. & L. ASSOCIATION
vs.
W. H. DENSON and Wife, ROSA E. DENSON. } No. 109. In Equity.

This cause came on to be heard before the Hon. Chas. Swayne, judge, etc., on the pleadings, proof, stipulations and agreements of parties and the entire record in the cause; from all of which the court is of the opinion, and so adjudges and decrees, that complainant is entitled to the relief sought in and by its bill.

And it appearing that on the 25th day of April, 1895, defendant, William H. Denson, made applications in writing to complainant for a loan of $2500 on fifty shares of stock held by him in complainant association, and offered a premium of $2500 for the privilege of obtaining said loan, and in the event the application should be granted, further offered to secure the payment of said loan and premium by a mortgage and deed of trust on the real estate to be hereinafter described; that said application, having been forwarded to complainant's board of directors at Chattanooga, Tenn., was there by said board approved and granted; that thereafter, to wit: on the 10th day of June, 1895, complainant forwarded to its traveling soliciting agent at Gadsden, Alabama, its check for $2367.50 in favor of defendant, Wm. H. Denson, being the $2500 which complainant had agreed to loan him as aforesaid, less the sum of $127.50, being three months due on said Denson's stock at the rate of $30 per month, and three months' interest on the $2500 loaned said Denson, at the rate of $12.50 per month, which complainant deducted from the amount advanced him in accordance with its custom and the provisions of its by-laws; that at the same time that it forwarded said check complainant also forwarded the note and deed of trust filed as Exhibit "A" and "B" respectively, to the orig-

inal bill in this cause, which were prepared by complainant's attorney at Chattanooga, Tenn., and on the execution of which the said check was to be delivered to said Denson; that said Denson duly signed said note and together with his wife the defendant Rosa E. Denson, executed and acknowledged said mortgage or deed of trust, which was duly recorded in Etowah county, Alabama, wherein the real estate mentioned and conveyed therein was located; that upon the execution of said note and mortgage said check was delivered to defendant Denson, who endorsed it to the First National Bank at Gadsden, Alabama, which subsequently forwarded it to Chat-
62 tanooga, Tennessee, and there received payment thereof from the Chattanooga national bank, on which it was drawn; and that complainant had no money on deposit in any bank in the State of Alabama at the time of said transaction; the facts are all so adjudged.

And it further appearing that defendant Denson made payments by way of interest and premium on said loan on the dates and in the amounts following, to wit:

Sept. 11, 1895	$27.50
Oct. 15, 1895	27.50
Nov. 8, 1895	27.50
Dec. 10, 1895	27.50
Jan. 16, 1896	27.50
Feb. 3, 1896	27.50
March 11, 1896	27.50
April 15, 1896	27.50
May 9, 1896	27.50
July 2, 1896	27.50
Aug. 12, 1896	55.00
Sept. 21, 1896	27.50

And that on each of the respective dates aforesaid said defendant also made payments by way of dues on his stock to the amount of $15 except the stock payment made on August 12, 1896, which was $30, making the total payments made by the defendant by way of dues on stock, the sum of $195, and that the payments aforesaid, together with the $127.50 deducted at the time the loan was made, constitute all payments made by said Denson; the facts are so adjudged.

It further appearing that since the filing of the bill in this cause, the complainant association has been declared insolvent and a receiver appointed for it, under a general creditors' and stockholders' bill filed against it on the second day of October, 1899, in the circuit court of the United States for the southern division of the eastern district of Tennessee, by one John G. Brown, a stockholder in said association; and that an ancillary bill has also been filed by the same complainant and an ancillary receiver appointed for said association in the circuit court of the United States for the northern division of the northern district of Alabama; the court is of the opinion, and so adjudges and decrees, that defendant Denson is entitled to credit on his loan for all payments made by him by way of

interest and premium, as hereinbefore set forth, but not for
63 the aforesaid payments made by him as dues on his stock;
but that, as to such stock payments, the said Denson stands in the same attitude as non-borrowing stockholders, and is entitled to share with them in the assets of the association, on the basis of the amount paid by him.

The court further adjudges and decrees that complainant has paid in insurance premiums on the property covered by the mortgage given it by defendant to secure said loan, the sum of $25 on Sept. 25th, 1895, and the sum of $20 on October 26th, 1898; and that it paid city taxes on said property on July 17, 1898, $21.20, and on January 23, 1899, $16.60; for all which amounts, with interest from the respective dates of payment, the court is of the opinion, and so decrees, that under the terms of said mortgage complainant is entitled to a lien on the property therein conveyed, and to payment out of the proceeds of sale.

The court further adjudges and decrees that after giving defendant Denson the credits to which he is entitled as hereinbefore adjudged, and charging him with the taxes and insurance premiums paid by complainant as adjudged, there is due and unpaid on the note sued on in the bill, with interest at six per cent. per annum on the amount of money actually advanced defendant thereon from the date of the loan to the date of this decree, the sum of ($2,841.15) two thousand, eight hundred and forty-one and 15/100 dollars.

And it further appearing that in his note and deed of trust aforesaid, defendant stipulated and agreed that in the event of default in the performance by him of the stipulations of his contract, and a foreclosure of said mortgage on account thereof, he would pay a reasonable attorney's fee for the collection of the amount due on said note; and that defendant has made default and is liable for such reasonable attorney's fee; and the court being of the opinion that ($200.00) two hundred dollars would be a reasonable fee to complainant's solicitors for their services in collecting the amount due on said note; it is therefore decreed that complainant recover said sum of ($200.00) to be paid out of the proceeds arising from the foreclosure of said mortgage, in addition to the principal and interest due on said loan.

It is further adjudged and decreed that complainant is entitled to a foreclosure of the mortgage or deed of trust given by defendants Denson and wife, to secure payment of said indebtedness; and unless defendants shall, within 90 days from the entry of this decree, pay into the registry of the court a sum sufficient to pay and satisfy the amounts due on said indebtedness as hereinbefore adjudged, together with interest thereon to the date of payment and all
64 the costs of this cause, C. J. Allison who is hereby appointed special master for the purpose of making said sale, will, after publication of notice once a week for at least four weeks prior to the sale, in at least one newspaper printed regularly, issued and having a general circulation in the county and State wherein the real estate proposed to be sold is located, to wit: in Etowah county, Alabama, which notice shall describe the real estate to be sold, and shall state

the time, place and terms of sale, offer for sale and sell at public outcry in front of the door of the court-house, of Etowah county, Alabama, to the highest and best bidder, on the terms mentioned and provided in said mortgage, to wit: for cash in hand and in bar of the equities of redemption and of homestead and dower, the real estate conveyed in and by said mortgage, which is described as follows:

Being the lot on which W. H. Denson now resides and described as lot No. four (4) according to Pope's map of the city of Gadsden; said lot fronts one hundred and fifty feet (150) on Forest Ave., and extends back of uniform width a distance of about three hundred and twenty-five feet (325) to Chestnut St.; said lot is bounded on the west by W. C. Bellinger's lot, and on the east by W. R. Dortch's lot. Also three lots on Forest Ave., commencing at the corner of Tenth St. and Forest Ave., and running west one hundred and fifty (150) feet along Forest Ave., then runs south one hundred and seventy-five (175) feet; thence east one hundred and fifty (150) feet to Tenth St.; thence along with Tenth St., to the beginning point.

Also two lots commencing at the corner of Eleventh St. and Third Ave., and running along west with said avenue one hundred and twelve and one-half (112½) feet; thence north to Dr. Thornton two garden paling; thence one hundred and twelve and one-half (112½) feet to Eleventh St.; thence south along with said Eleventh St. to the beginning point.

In the event such sale is made, the said special master will forthwith report to the court in writing his action in the premises, to the end that such further orders and decrees may be made thereon as to the court may seem proper. Done in open court this sixth day of October, 1900.

CHAS. SWAYNE, *Judge.*

(Indorsed:) Filed Oct. 6th, 1900. Chas. J. Allison, clerk.

65 *Petition for Allowance of Appeal.*

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, Sitting in Equity, at Birmingham, Ala.

CHATTANOOGA NATIONAL BUILDING & LOAN Association, a Corporation, *vs.* WILLIAM H. DENSON and ROSA E. DENSON. } No. 109. In Equity.

To the Hon. Charles Swayne, United States district judge, northern district of Florida, presiding in said court:

The defendants in the above-entitled cause, conceiving themselves aggrieved by the order and decree made and entered in the above-entitled cause on the 6th day of October, 1900, wherein and whereby it was ordered, adjudged and decreed that defendant W. H. Denson was due the defendant at the date of said decree, the sum of two

thousand eight hundred and forty-one 15/100 dollars on a note executed by said Denson to complainant and to collect which said bill was filed, and that the complainant is entitled to a foreclosure of the mortgage or deed of trust executed by said Denson and his wife, R. E. Denson and co-respondent to complainant, and which is attached to the original bill, and identified as Exhibit "B" thereto, to secure the payment of said indebtedness, and unless defendant shall within — days from the entry of this decree, pay into the registry of this court a sum sufficient to pay and satisfy the amounts due on said indebtedness, as hereinbefore adjudged to be due, together with interest thereon to the date of payment and all costs of this cause, then the special master named in said decree after advertising the sale of said real estate described in said mortgage or deed of trust and in said decree once a week for four weeks, shall proceed to sell said real estate for cash in hand, and in bar of the equity of redemption and of homestead or dower, to pay said amounts so adjudged and decreed to be due. And said special master upon making said sale will forthwith report to the court in writing his action in the premises, to the end that such further orders and decrees may be made thereon as to the court may seem proper, do hereby appeal from said order and decree of the sixth of October, 1900, to the United States circuit court of appeals for the fifth circuit, for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed, and that a transcript of the
66 record, papers and proceedings upon which said order and decree was made, duly authenticated may be sent to the United States circuit court of appeals for the fifth circuit.

That an order may be made fixing the amount of bond or security which defendants or either of them shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the said United States circuit court of appeals for the fifth circuit.

And your petitioners will ever pray, etc.

WILLIAM H. DENSON,
Solicitor for Respondents.

Dated Oct. 6th, 1900.

(Indorsed:) Chattanooga National Building & Loan Association vs. W. H. Denson, *et al.* Petition for allowance of appeal. Filed Oct. 6th, 1900. Chas. J. Allison, clerk.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

CHATTANOOGA NATIONAL BUILDING & LOAN Association, a Corporation,
vs.
WILLIAM H. DENSON and ROSA E. DENSON. } No. 109. In Equity.

Come now the respondents in the above-entitled cause and file the following assignment of errors, upon which they and each of them

will rely in the prosecution of their and each of their appeal from the decree made by this honorable court on the 6th day of October, 1900, in the above-entitled cause:

I.

The court erred in pronouncing the decree, because the proof showed affirmatively, and without contradiction that the complainant in making the loan and securing the same by said note and mortgage did an act of business in the State of Alabama, without having complied with the constitution and statutes of Alabama, prescribing the conditions under which a foreign corporation can do business in Alabama.

67

II.

The court erred in pronouncing the decree because the proof showed affirmatively and without contradiction that the loan of the money and securing the same by note and mortgage were invalid and void under the constitution and statutes of Alabama, and could not in law or equity be a foundation on which to either maintain this action or upon which the court could pronounce a decree in favor of the complainant.

III.

The court erred in decreeing the loan of the money, the note given therefor, and the mortgage executed and given to secure said notes were each a legal, valid and binding transaction.

IV.

The court erred in decreeing the loan of money was a legal, valid and binding transaction.

V.

The court erred in decreeing the execution of the note was a legal, valid and binding transaction.

VI.

The court erred in decreeing that the execution of the mortgage was a legal, valid and binding transaction.

VII.

The court erred in decreeing the loan of the money, the note given therefor and the mortgage executed and given to secure the payment of said note, were not acts of business done or performed in the State of Alabama by the complainant, a foreign corporation.

VIII.

The court erred in decreeing that the loan of the money was not an act of business done or performed in the State of Alabama, by the complainant, a foreign corporation.

IX.

The court erred in decreeing that the execution of the note was not an act of business *did* or performed in the State of Alabama, by the complainant, a foreign corporation.

X.

The court erred in decreeing that the execution of the mortgage was not an act of business — or performed in the State of Alabama, by the complainant, a foreign corporation.

68 XI.

The court erred in not decreeing the loan of the money and execution of the note and mortgage were illegal and void transactions.

XII.

The court erred in not decreeing that the loan of the money was an illegal and void transaction.

XIII.

The court erred in not decreeing that the execution of the note was an illegal, invalid and void transaction.

XIV.

The court erred in not decreeing that the execution of the mortgage was an illegal, invalid and void transaction.

XV.

The court erred in adjudging and decreeing that said defendants or either of them were due anything on said note or indebtedness.

XVI.

The court erred in decreeing a foreclosure of said mortgage and ordering a sale of said lands to pay said amount so adjudged and decreed to be due on said note or indebtedness.

XVII.

The court erred in pronouncing the final decree in favor of the complainant and decreeing costs against the defendants.

XIX.

The court erred in decreeing a bar of equity of redemption of defendants or either of them in said land upon a sale thereof.

XX.

The court erred in decreeing a bar of the homestead of defendant or either of them in said lands on a sale thereof.

XXI.

The court erred in decreeing a bar of the right of dower of the defendant Rosa E. Denson, in said lands on a sale thereof.

In order that the foregoing assignments of error may be and appear of record the defendant presents the same to the court, and prays that such disposition may be made thereof as in accord-
69 ance with law, and the statutes of the United States in such case made and provided.

All of which is respectfully submitted.

W. H. DENSON,
Solicitors for the Defendants.

Dated Oct. 6th, 1900.

(Indorsed:) Chattanooga National Building & Loan Association *vs.* W. H. Denson *et al.* Assignment of errors. Filed Oct. 6th, 1900. Chas. J. Allison, clerk.

Order of the Court Granting Appeal and Fixing Amount of Supersedeas Bond.

In the Circuit Court of the United States for the Fifth Judicial Circuit in and for the Southern Division of the Northern District of Alabama, at a Regular Term Thereof Held at the Court-room, in the City of Birmingham, on the Sixth Day of October, 1900.

Present: The Honorable Chas. Swayne, United States district judge for the northern district of Florida, sitting in equity.

CHATTANOOGA NATIONAL BUILDING & LOAN ASSOCIATION, a Corporation,
vs.
WILLIAM H. DENSON and ROSA E. DENSON.

The defendants in the above-entitled cause, having filed in this court their petition for allowance of appeal, together with their and each of their assignments of error, within due time, and also praying that an order be made fixing the security which the defendants should give and furnish upon said appeal, and that upon giving such security all further proceedings of this court be suspended and stayed until the determination of said appeal by said United States circuit court of appeals in and for the fifth judicial circuit:

Now, it is ordered that an appeal to the United States circuit court of appeals, for the fifth circuit, from the final decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits,
70 stipulations, agreements affidavits and all proceedings herein . be forthwith transmitted to the said United States circuit court of appeals.

It is further ordered, that the bond on appeal be fixed at one thousand dollars. That upon the said defendants William H. Denson and Rosa E. Denson, or either of them filing with the clerk

of this court a good and sufficient bond in the sum of one thousand dollars within ninety days from this date to be approved by the clerk of this court, and to the effect that if the said defendants William H. Denson and Rose E. Denson and the plaintiffs in error, or either of them shall prosecute said appeal to effect and answer all damages and costs if they fail to make their appeal good, then the said obligation to be void, else to remain in full force and effect, then all further proceedings in this court, and all further proceedings on said final decree be, and they are hereby suspended and stayed until the determination of said appeal by said United States circuit court of appeals.

Dated this 6th day of October, 1900.

CHAS. SWAYNE,
District Judge.

(Indorsed:) Chattanooga National Building & Loan Association vs. W. H. Denson *et als.* Order of the court granting appeal, and fixing supersedeas bond. Filed Oct. 6th, 1900. Chas. J. Allison, clerk.

Appeal and Supersedeas Bond.

In the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

CHATTANOOGA NATIONAL BUILDING & LOAN ASSOCIATION
vs.
WILLIAM H. DENSON and ROSA E. DENSON.

Know all men by these present, that we, William H. Denson and Rosa E. Denson, as principals, and the United States Fidelity and Guaranty Company of Baltimore, Md., are held and firmly bound unto the Chattanooga National Building and Loan Association in the sum of one thousand dollars, to be paid to the said Chattanooga National Building and Loan Association, its attorneys or assigns, to which payment, well and truly to be made, we bind ourselves and our heirs, executors administrators and successors jointly and severally firmly by these presents.

71 Sealed with our seals and dated this 18th day of October, 1900.

Whereas, lately at a session of the circuit court of the United States for the southern division of the northern district of Alabama, in a suit pending in said court between Chattanooga National Building and Loan Association, complainant, and William H. Denson, and Rosa E. Denson, respondents, a decree was rendered against said respondents, and they, the said respondents, William H. Denson, and Rosa E. Denson, having obtained from said court an order allowing an appeal to the United States circuit court of appeals, for the fifth judicial circuit to reverse the decree of the aforesaid suit, and also an order fixing the appeal bond at the sum of one thousand dollars, with surety, to be approved by the clerk of said court, to

the effect that if the said respondents William H. Denson and Rosa E. Denson or either of them shall prosecute said appeal to effect, and pay all damage and costs if they fail to make their appeal good, then all further proceedings in this court, and all further proceedings on said final decree, be and they are hereby suspended and stayed until the determination of said appeal by the said United States circuit court of appeals, and a citation directed to the said Chattanooga National Building & Loan Association is about to be issued, admonishing and citing the said association to be and appear at the United States circuit court of appeals for the fifth judicial circuit to be holden at New Orleans, Louisiana,

Now, therefore, the condition of the above obligation is such that if the said William H. Denson and Rosa E. Denson shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue. And each of us waives all exemptions of property from the payment of debts allowed either of us under the laws of Alabama, to secure the payment of this bond.

W. H. DENSON. [SEAL.]
R. E. DENSON [SEAL.]

(5c. U. S. int. rev. stamp cancelled.)

[Seal of Fidelity & Guaranty Co.]

THE UNITED STATES FIDELITY & GUARANTY CO.,
By LOUIS V. CLARK, *Agent, and* [SEAL.]
By WM. M. WALKER, *Att'y.*

Sufficiency of surety on the foregoing bond approved this the 19th day of October, 1900.

CHAS. J. ALLISON, *Clerk.*

72 (Indorsed:) Chattanooga National Building & Loan Association *vs.* W. H. Denson, *et al.* Appeal and supersedeas bond. Filed in office this 19th day of October, 1900. Chas. J. Allison, clerk.

Citation.

UNITED STATES OF AMERICA:

The President of the United States to the Chattanooga National Building & Loan Association, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fifth judicial circuit, to be holden at New Orleans, La.,

Pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern division of the northern district of Alabama, wherein William H. Denson and Rosa E. Denson are plaintiffs in error, and you are defendant in error, to show

cause, if any there be, why the decree rendered against the said plaintiffs in error as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 18th day of October, in the year of our Lord one thousand nine hundred.

CHAS. J. ALLISON,
Clerk U. S. Circuit Court, Southern Division,
Northern District of Ala.

We hereby acknowledge service of the within citation, this October 20th, 1900.

(Signed) PRITCHARD & SIZER,
Solicitors for Complainant.

(Indorsed:) William H. Denson, Rosa E. Denson, *vs.* Chattanooga National Building & Loan Association. Citation.

73 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Northern District of Alabama, Southern Division.

I, Chas. J. Allison, clerk of the circuit court of the United States for the southern division of the northern district of Alabama, do hereby certify that the foregoing pages Nos. 1 to 109, inclusive (in manuscript) contain a true, correct and complete transcript of all the pleadings, proceedings and judgment appealed from, in the case of Chattanooga National Building & Loan Association *vs.* William H. Denson and Rosa E. Denson, being No. 109, in equity, in said court, as fully as the same remains on file and of record in my office.

Given under my hand and the seal of said circuit court, at Birmingham, Alabama, in said division and district, this — day of November, A. D. 1900.

[SEAL.] CHAS. J. ALLISON,
Clerk U. S. Circuit Court, Southern Division,
Northern District Alabama.

74 In the United States Circuit Court of Appeals for the Fifth Circuit.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, Appellee,
versus
WILLIAM H. DENSON and Wife, ROSA E. DENSON, Appellants.

In this cause it is stipulated and agreed that the citation of appeal in this cause, having been issued by the clerk of the court and signed by said clerk, the same may be taken and accepted as though issued and signed by the judge of said court, in accordance with the statutes and rules of practice.

It is further agreed that a return day may be inserted in said citation of appeal fixing such return day at 30 days after the signing of said citation.

It is further agreed that the bond for appeal given in this cause, having been approved and taken by the clerk of the court, the same may be taken and considered by the court of appeals as though the same had been taken and approved by the trial judge, and the same shall be considered as in all respects a valid and binding bond.

This agreement is made for the purpose of curing any defects in the signing or issuing of the citation of appeal in this cause, and curing any defect in said citation with reference to the return day thereof, and for the purpose of curing any defect in the approval of the appeal bond given in this cause, and — save the necessity of procuring a proper citation signed by the judge, with return day inserted therein, and a new bond approved by the trial judge.

Given under our hands and seals this the 13th day of November, 1900.

PRITCHARD & SIZER,
Attorneys for Appellee.
W. H. DENSON,
Attorney for Appellants.

75 In the United States Circuit Court of Appeals for the Fifth Circuit.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION
versus
WM. H. DENSON and WIFE.

In this cause it is stipulated and agreed that the complainant is a corporation chartered and organized under and in accordance with the public statutes of the State of Tennessee, authorizing the creation of corporations for carrying on the business of building and loan associations; that its principal office and place of business is, and was at the time the loan involved in this case was made, and has ever since continuously been, in the city of Chattanooga, State of Tennessee; and that the loan to defendant, Wm. H. Denson, involved in this case was made in accordance with the power and authority conferred on complainant by its charter, and in the manner prescribed by its by-laws.

It is further stipulated and agreed that the charter and by-laws of complainant need not be printed in the record for the circuit court of appeals in this cause, no point being made thereon by the defendants.

This — day of November, 1900.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,
By J. B. SIZER, *Solicitor.*
W. H. DENSON AND
R. E. DENSON,
By W. H. DENSON, *Counsel of Record.*

76 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900. April 2, 1901.

W. H. DENSON ET AL.
versus
CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION.

(*Extract from Minutes.*)

This cause was regularly called this day and submitted to the court after argument by Mr. W. H. Denson for appellant and by Mr. J. B. Sizer for appellee.

November Term, 1900. April 16, 1901.

W. H. DENSON ET AL.
versus
CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION.

(*Extract from Minutes.*)

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Alabama, and was argued by counsel.

On consideration whereof: it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, reversed and this cause remanded to said circuit court with instructions to dismiss the bill.

It is further ordered, adjudged and decreed that the appellees * * * The Chattanooga National Building and Loan Association, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

77 United States Circuit Court of Appeals, Fifth Circuit.

WILLIAM H. DENSON and ROSA E. DENSON, Plaintiffs in Error,
versus
CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, Defendant in Error.
No. 1028.

Petition to Rehear.

To the honorable the judges holding the court aforesaid:

Your petitioner, The Chattanooga National Building and Loan Association, the appellee in the above-styled cause, respectfully shows unto your honors that it is much aggrieved by the decision of this honorable court reversing the decree of the circuit court in the above-styled cause and remanding the cause with instructions to dismiss the bill, as more fully appears from the opinion of the court filed on the 16th day of April, 1901.

The question involved in this cause was whether or not the transactions on which the suit was based constituted a doing of business

in the State of Alabama, and if so, then whether petitioner should be repelled from court by reason of its failure to comply with certain requirements prescribed by the constitution and statutes of Alabama as conditions precedent to its right to do or transact any business in that State. It was contended by petitioner that said transactions did not constitute a doing of business in the State of Alabama, but that the contract sued on was made and to be performed in the State of Tennessee, and that it was beyond the power of the State of Alabama to prohibit the making, or forbid the enforcement, of such a contract. By and in its opinion aforesaid, this honorable court has decided adversely to petitioner's said contention, and has held that the transactions constitute a doing of business by petitioner in the State of Alabama, within the purview and inhibition of said constitutional and statutory provisions and that, petitioner not having complied with said provisions at the time the loan sued on was made, the courts would not enforce the contract.

Petitioner most respectfully shows unto your honors that among other cases cited by it to sustain its contention on the hearing of this case, was the opinion of Judge Hammond, in the circuit
78 court for the western district of Tennessee, in the case of Eastern Building and Loan Association *vs.* Bedford, reported in 88 Fed. Rep. page 7, *et seq.* The facts involved in that case were almost identical on every point with those in this case, and the Tennessee statute, invoked as a defense to the suit of the complainant therein, provided, in almost the same language as the constitutional and statutory provisions relied on in this case, that "it shall be unlawful for any foreign corporation to do or attempt to do any business or acquire any property within this State, without having first complied with the provisions of this act." The opinion of Judge Hammond was that the facts did not constitute a doing of business in the State of Tennessee, and for that reason the loan sued on was not affected by the statute in question.

It was stated at bar in the argument of this case, that the Bedford case, *supra*, having been appealed by the defendants to the circuit court of appeals for the sixth circuit, was then pending in the Supreme Court of the United States on certain questions or propositions of law which the said circuit court of appeals had certified to the supreme court. Petitioner has since discovered, however, that in fact the whole record in said cause was sent up to the supreme court, on its requirement, and the whole matter in controversy has been tried in that court, and has now been decided by it in an opinion delivered a few days after the rendition of your honors' opinion in this case. The supreme court has affirmed the decree of the circuit court in said cause, and has held and adjudged that the contract involved therein was not a doing of business in the State of Tennessee, and that the legislature of Tennessee had no power to prohibit the making of such a contract, or to interfere with its enforcement.

Petitioner verily believes that in no essential feature can the Bedford case be distinguished from this one, although in several particulars the facts in that case more strongly indicated a doing of

business by the complainant therein in the State of Tennessee, than do the facts in this case indicate a doing of business by your petitioner in the State of Alabama. Among such particulars, as was pointed out in petitioner's brief on the hearing of said cause in this court, were the facts (1) that the notes involved in the Bedford case were dated at the place of the borrower's domicile, while in this case they are dated at the place of the domicile of the lender of the money, and payee of the note; (2) that in that case, the com-
79 plainant corporation had a local board and a local agent in the State in which the borrower resided, while here, petitioner's only agent in Alabama was a traveling soliciting agent; (3) that there was no express stipulation in that contract, as there is in the one involved in this case, that the contract should be governed by the law of the place of payment, the domicile of the payee corporation; and (4) that the supreme court of Tennessee had expressly held that such a transaction as was there involved constituted a doing of business in that State, while the supreme court of Alabama, as petitioner contended, had not passed on the question under a state of facts such as is presented by the record in this case.

Petitioner is advised, and respectfully submits that even if this court should consider itself not absolutely bound to follow the opinion of the supreme court, it will yet give to that opinion great weight and consideration in passing on the same or similar questions.

In view of the importance of the question involved and of uniformity in the holdings thereon among the different Federal courts, and in further view of the great weight to be attached to the opinion of the supreme court on a question on which there has heretofore been, as held by this honorable court, a conflict of opinion, petitioner most respectfully but earnestly prays that your honors reconsider the former opinion delivered in this case and grant petitioner a rehearing thereof.

ROBERT PRITCHARD,
J. B. SIZER,
Solicitors for Petitioner.

I, J. B. Sizer, of counsel for the petitioner herein, do hereby certify that in my opinion the foregoing petition for a rehearing is well founded in point of law, and that the same is not interposed for delay.

J. B. SIZER.

United States circuit court of appeals,
Filed May 8, 1901.

J. M. McKEE, *Clerk.*

80 November Term, 1900. June 1, 1901.

W. H. DENSON ET AL.
versus
CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION. } No. 1028.

(*Extract from Minutes.*)

Ordered, that the petition for rehearing filed in this cause be and the same is hereby denied.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

WILLIAM H. DENSON and ROSA E. DENSON, Plaintiffs in Error,
versus
CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, Defendant in Error. } No. 1028.

Appeal from the circuit court of the United States, northern district of Alabama.

Before Pardee, McCormick, and Shelby, circuit judges.

PARDEE, circuit judge, delivered the opinion of the court:

The contention herein is that the contract sought to be enforced by the bill is illegal, on account of the failure of complainant to comply with the laws of Alabama prescribing the conditions under which foreign corporations may do business in that State. The laws in question are:—

"4. No foreign corporation shall do any business in this State without having at least one known place of business and an
81 authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State." Const. Ala., Art. XIV.

"1316. Foreign corporations must file instrument of writing designating agent and place of business in this State.—Every corporation not organized under the laws of this State shall, before engaging in or transacting any business in this State, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this State and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this State." Code Ala. 1896.

"1318. Unlawful for foreign corporation to transact business in

this State before declaration filed; penalty.—It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this State without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the State the sum of one thousand dollars." *Ib.*

"1319. Unlawful to act as agent of foreign corporation before such declaration is filed; penalty.—It is unlawful for any person to act as agent or transact any business directly or indirectly, in this State, for or on behalf of any foreign corporation which has not designated a known place of business in this State and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to the State the sum of five hundred dollars." *Ib.*

The complainant below, The Chattanooga National Building and Loan Association, is, and was at the time the loan to Mr. Denson was made, a corporation under the laws of the State of Tennessee, with its principal office in the city of Chattanooga in that State. Among its corporate functions was the authorization, and, so far as we are advised, its sole business, was to loan its funds to its
82 stockholders on real-estate security. It had no local office or agent in Alabama, but it had a traveling agent whose business it was to solicit subscriptions to its stock and to obtain applications for loans and submit the same to the home office of the association at Chattanooga.

On the 25th of April, 1895, appellant Denson, who was a resident of Gadsden, Alabama, on the suggestion and at the solicitation of the agent, signed at that place a written application for fifty shares of stock in the association, complainant below, appellee in this court. This application was forwarded by the agent, to whom Mr. Denson delivered it, to the home office, where the stock was issued and returned to the agent to be by him delivered to Mr. Denson. On the same day on which he applied for his stock, Mr. Denson signed a written application to the association for a loan of $2,500 on the fifty shares of stock he had applied for. He offered a premium of $2,500 for the loan, and proposed to secure the loan and premium, if his application should be granted, by a mortgage on certain real estate in Gadsden, Ala., which he represented to be of the value, in all, of about $9,000. This application was accompanied by the report of two parties selected by the association fixing the value of the property which Denson proposed to mortgage at $8,000, and the certificate of an attorney, also selected by the association, with reference to the condition of the title. This application was forwarded by the agent to the home office in Chattanooga, where it was submitted along with other applications to the board of directors, by whom the application was granted and the loan directed to be made in accordance with the charter and by-laws of the association. Thereupon, a note and deed of trust were prepared at the home office, and were sent to the agent by whom Mr. Denson's application had been taken and forwarded; and at the same time the check of

the association on the Chattanooga National Bank of Chattanooga, Tenn., in favor of W. H. Denson for the sum of $2,367.50 was sent to one D. P. Goodhue of Gadsden, with instructions to him to deliver said check to Mr. Denson when he should have executed and delivered the note and deed of trust. Upon the execution of the note and deed of trust by Denson and wife and the delivery of the same to the agent, all at Gadsden, Ala., the agent delivered to Denson the check for $2,367.50, directing him to present the same to the First national bank of Gadsden, which would pay the same. The check was presented to the said bank and the face thereof paid over
83 to Denson, as the cashier said, "under an understanding with the said Building and Loan Association and that the Chattanooga national bank on which the check was drawn would pay the same on presentation."

The note given to the association by Denson is dated at Chattanooga, Tenn., and is made payable at the home office of the association in Chattanooga; and it expressly stipulates that it "is made with reference to and under the laws of the State of Tennessee."

The secretary of the association gives the following significant evidence:

"At the time the loan to defendant Denson was made, complainant association had been for some time soliciting subscriptions to stock and receiving applications for loans in the State of Alabama, and had paid a tax or license fee required under the laws of the State of Alabama, for foreign corporations proposing to do business in that State, and defendant's officers supposed and understood that the payment of this fee or tax was the only condition with which it was necessary for them to comply in order to be entitled to do business in that State. Subsequently, however, and some months after the loan to defendant Denson was made, complainant was informed by an attorney in the State of Alabama, that the Alabama statutes required foreign corporations doing business in Alabama, to designate a local agent on whom process against the association could be served, and also a local place of business in that State. Thereupon complainant promptly designated such local agent and place of business and continued up to the second of October, 1899, to pay the license tax or fee required of non-resident corporations doing business in Alabama, and to keep a local agent and place of business in that State."

The question presented in this case is not under the laws of which State is the contract of loan to be construed, nor in what place was the money loaned to be repaid; and this eliminates from the necessary consideration of this case very many of the adjudged cases cited in the briefs on both sides; and, we may say, with regard to the remaining cases cited, that it is impossible to reconcile them with each other, and that (as is generally the case where the courts have in mind to compel the payment of an honest debt as against prohibitory laws) the application and construction of the particu-
84 lar prohibitory laws and the reasons given therefor should generally be restricted to the individual case, and for other cases considered to be more or less instructive but never conclusive.

On the facts as recited in the present case, it is perfectly clear that all the business of loaning money to Denson, with the single exception, that the association in Tennessee said "Yes," was transacted in the State of Alabama, and that the contract was completed by the execution and delivery of a note and deed of trust and the payment of the money loaned, all in the State of Alabama; and, the same was "doing the business for which the association was incorporated" within the meaning of the constitution and laws of the State of Alabama, as above quoted. And it may be said, if all this be not the doing of business of a foreign corporation within the prohibition of the constitution and laws of Alabama, then the National Building and Loan Association of Chattanooga and other foreign associations engaged in the same business of loaning money on real security, may safely flood the State of Alabama with soliciting agents, make all the negotiations for loans, take real-estate securities therefor and fully transact all other business pertaining to their corporate functions as though incorporated therein, and yet neither be obliged to have a known place of business or any authorized agent within the State, nor pay any license tax or fee, as required of non-resident corporations doing business therein.

To show the construction and effect of the constitution and laws of Alabama regulating the transaction of business within the State by non-resident corporations, we cite from the decisions of the Alabama supreme court, which are without conflict on the subject:

"The real test is that applied in Beard *vs.* U. & A. Publishing Co., *supra;* is the corporation engaged in the transaction of business, or any part thereof, it was created and organized to transact? If it be, it 'does business' within the meaning of the constitution. If it be not—if the act it is doing, or has done, is not within its general powers and franchises—it is not the business to which the constitutional requirement is directed." Sullivan *vs.* Sullivan Timber Co., 103 Ala. 371, 380.

"The business upon the doing of which the plaintiff relied for a recovery was the loan of money by the defendant to a resident citizen of this State, the taking of a mortgage upon land of the borrower situated in this State to secure the debt, which was
85 evidenced also by promissory notes, with separate notes for instalments of the interest. Under the constitution and the statute a single act of business done, without complying with the prescribed conditions, is a violation of both: there need not be a carrying on of business. The loan of money here and the taking here of notes and mortgage to secure repayment, the mortgage being on land situated in this State, is the doing of business here within both the constitution and the statute. Guin *vs.* New England Mortgage Security Co., 92 Ala. 135; Farrior *vs.* New England Mortgage Security Co., 88 Ala. 275; Mullens *vs.* American Freehold Land Mortgage Co., 88 Ala. 280. And the facts that the notes and mortgage are executed here, though they may be payable elsewhere, and the land embraced in the mortgage is situated here, are sufficient to show *prima facie* that the transaction involves the doing of business by the lender and mortgagee in the State of Alabama. Farrior *vs.*

New England Mortgage Security Co., 88 Ala. 275; Mullens *vs.* American Freehold Land Mortgage Co., 88 Ala. 280." The State *vs.* Bristol Savings Bank, 108 Ala. 36.

And as a further instructive case on this subject:

"The bill alleges that the complainant corporation, "under its charter and laws of incorporation, had full power and authority" to loan the money and take the mortgage in controversy. In engaging in such a transaction, the complainant was in the exercise of its chief corporate function, as imported by its very name, and as admitted by the bill. The prohibition of the constitution is against 'doing any business in this State,' without compliance with the conditions specified. The doing of a single act of business, if it be in the exercise of a corporate function, is as much prohibited as the doing of a hundred such acts; and it is just as much opposed to the policy of the constitution, which is to protect our citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process from our courts, in the event of any existing necessity to bring suit against them to vindicate a legal right, or to contest the validity of any contract made by or with them. The phrase, 'doing any business,' is more comprehensive in meaning than the carrying on, or engaging in business generally, which involves the idea of continuance, or the repetition of like acts. All the adjudged cases, so far as we have examined, in and out of this State, assume this to be true, except the case
86 of Cooper Man. Co. *vs.* Ferguson, 113 U. S. 727; 2 Morawetz on Corp. (2d ed.), § § 661, 665, and cates cited. There it was said that a clause in the constitution of Colorado, like the one here under consideration, was not to be construed to prohibit a single act, but only 'the carrying on of business' by a foreign corporation. The act there done was the making of a contract in Colorado, to manufacture certain machinery in Ohio, to be delivered in the latter State for transportation to the purchasers in the former. The promise was a mere agreement to deliver goods in another State, and possibly was not the unlawful exercise of a corporate function. Beard *vs.* Union & Amer. Pub. Co., 71 Ala. 60. However that may be, we do not concur in the construction given, in which also two of the judges of the court rendering the decision, it seems, did not agree. Their concurrence in the judgment was placed solely on the ground, that the prohibition contained in the Colorado constitution, when directed against a sale of that character, would be an attempted regulation of commerce between the States,—and on this account void for repugnancy to the Federal Constitution.

"4–5. In Dudley *vs.* Collier, 87 Ala. 431, we discussed at some length this clause of our constitution, and the act of the legislature seeking to carry it into effect by the imposition of penalties on offending parties. We there distinguished Sherwood *vs.* Alvis, 83 Ala. 115, as involving the case of a foreclosed mortgage, by which the contract in question had become, in a measure, fully executed between the parties. This distinction is recognized, also, in the more recent deliverance of Craddock *vs.* American Mortgage Land Co., decided at the present term, which was determined on the authority

of that case. The legislative act cannot change the construction or meaning of the constitutional clause under consideration. It may throw light on its construction, and render its enforcement more effective; but it can neither add to, nor take from, the legal significance of its meaning, which was the same before as after the date of the enactment designed to give vigor to its execution. But the statute may be looked to as a legislative interpretation of the constitutional clause, and, as such, is entitled to much weight. Cooper Man. Co. *vs.* Ferguson, 113 U. S. 727; *Ex parte* Hardy, 68 Ala. 303.

"This case, in our judgment, must be governed by the rule declared in Dudley *vs* Collier, *supra*. The loan of the money by complainant to the defendant, was an act of corporate business
87 which was prohibited by the constitution; and this illegal act was the consideration of the defendant's promise to pay the borrowed money. The promise, therefore, was void and being executory, the courts will not lend their aid to its enforcement, for this would be a subversion of a regulation made for the public good.

"Apparent injustice, it is true, often follows from the application of provisions of this nature, by which contracts are annulled for illegality, or as obnoxious to good morals, or violative of public policy, or for repugnancy to positive statutes. But the law does not allow this result for the benefit of either of the offending parties, as being less censurable or more favored than the other. It only lets the parties, who are in equal fault, severely alone, as the surest mode of securing obedience to the authority of its mandates." Farrior *vs.* New England Mortgage Security Co., 88 Ala. 275, 278, 279.

Following the proper rule, as declared in the last-cited case, *i. e.*, to "let the parties who are in equal fault severely alone," the decree of the circuit court is reversed and the cause is remanded with instructions to dismiss the bill.

88 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing eighty-eight pages, numbered from *a* to 87, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court, in the case of W. H. Denson and Rosa E. Denson, appellants, *vs.* Chattanooga National Building and Loan Association, appellee, No. 1028, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 18th day of January, A. D. 1902.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

89 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which William H. Denson and Rosa E. Denson are appellants and Chattanooga National Building and Loan Association is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the northern district of Alabama, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and
90 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of January, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

91 [Endorsed:] File No. 18,345. Supreme Court of the United States. No. 492, October term, 1901. Chattanooga National Building & Loan Asso'n *vs.* Wm. H. Denson and Rosa E. Denson. Writ of certiorari.

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

In obedience to the command of the within writ, and by direction of the judges of the United States circuit court of appeals for the fifth circuit, I, Charles H. Lednum, clerk of said court, as a return to and in compliance with said writ, do herewith transmit to the honorable the Supreme Court of the United States, a true, full and perfect transcript of the record and all proceedings had in said court in the cause wherein William H. Denson *et al.* were appellants and The Chattanooga National Building and Loan Association was appellee, as fully and completely as the same now remains of record in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Given under my hand and the seal of said United States circuit court of appeals for the fifth circuit, at the city of New Orleans, Louisiana, this 18th day of January A. D. 1902.

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 18,345. Supreme Court U. S., October term, 1901. Term No. 206. The Chattanooga National Building and Loan Association, petitioner, *vs.* Wm. H. Denson *et al.* Writ of certiorari and return. Filed Jan'y 21", 1902.

No. 492 206.

Supreme Court of the United States

PETITION FOR CERTIORARI.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,
Petitioner,

versus

WILLIAM H. DENSON and ROSA E. DENSON,
Respondents.

Petition for Certiorari to Circuit Court of Appeals, Fifth Circuit.

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1901.

EX PARTE CHATTANOOGA NATIONAL BUILDING & LOAN ASSOCIATION,

PETITIONER.

Petition for Writ of Certiorari Requiring the Circuit Court of Appeals for the Fifth Circuit to Certify to the Supreme Court for its Review and Determination in the case of William H. Denson and wife, Rosa E. Denson, Appellants, v. Chattanooga National Building & Loan Association, Appellee.

To the Honorable the Supreme Court of the United States:

The petition of the Chattanooga National Building & Loan Association respectfully shows to this Honorable Court as follows:

I.

Your petitioner is a corporation chartered and organized under the laws of the State of Tennessee. Petitioner was organized under the general corporation laws of the State of Tennessee, and was granted and has, under its charter and the laws aforesaid, the power and authority to lend its funds to its stockholders on such terms and conditions and in such manner and under such regulations as may be prescribed by its constitution and by-laws, such loans to be secured by real estate; and in order to determine which one of the stockholders shall receive the loan, where there are a number simultaneously applying for it, petitioner's board of directors is authorized and required by the statutes of Tennessee aforesaid, and by petitioner's charter, to loan the funds in its treasury either in open meeting, or by action on written application and bids, at a rate of interest not in conflict with the laws of the State of Tennessee, to the stockholder or stockholders who will bid the highest premium for the privilege of obtaining such loan; the premium so bid to be repaid by the borrower in regular weekly or monthly installments, not as a part of the loan or as interest, but as a means of determining the right, as among competing stockholders, to obtain the loan. The statutes aforesaid require and prescribe that the stockholder who shall bid the highest premium for

the preference or priority shall be entitled to a loan out of the funds in the treasury to the extent of not more than two hundred dollars on each share of stock held by him, on condition, however, that he shall give good and approved security for the repayment of the money so borrowed. The home office and principal place of business of petitioner is, and has been continuously since its organization, in the city of Chattanooga, Tennessee.

II.

The said William H. Denson and wife, Rosa E. Denson, were, on the dates of each of the transactions hereinafter stated, citizens of the State of Alabama and residents of the city of Gadsden, in said State.

III.

On the 25th day of April, 1895, and prior thereto, petitioner had no local office or place of business, or resident agent, in the State of Alabama, and had done no business in that State except that it had in its employ a traveling soliciting agent named Kennedy, whose business it was to solicit subscriptions to petitioner's stock, and to submit applications for loans from petitioner. It had, however, in contemplation of doing business and establishing an agency in Alabama, paid the tax or license fee required under the laws of the State of Alabama from foreign corporations proposing to do business in that State, but had not complied with certain provisions of the Alabama laws hereinafter set forth, with reference to designating a place of business, and an authorized agent, in said State. Petitioner's failure to comply with these requirements was due to the fact that its agents and officers were ignorant of them; and as soon as they learned of said requirements, which was some months after the transactions to be hereinafter set forth took place, they promptly complied with them.

IV.

On the 25th day of April, 1895, the said William H. Denson, at his home in Gadsden, Alabama, signed a written application for fifty shares of petitioner's stock, and in said application agreed to abide by all the by-laws, rules and regulations of the petitioner; and this written application was delivered by said Denson to petitioner's said traveling soliciting agent Kennedy, who was in Gadsden at that time, by whom the same was forwarded to the petitioner at his home office in the city of Chattanooga aforesaid. In accordance with said application, said stock was duly issued at petitioner's home office and a certificate representing the same was sent by petitioner to said Kennedy, who delivered it to the applicant Denson. The purport and substance of the

recitals in said certificate was that the said Denson had subscribed for and was the owner of fifty shares of stock in the petitioner, on which he agreed to pay to petitioner sixty cents monthly on each share, until such share should mature or be withdrawn, which payments should be made at the home office of petitioner provided, however, that the members in any town might elect a local treasurer and make payments to him for transmission to the home office, in which event the local treasurer would be the agent of the members and not of petitioner. Said certificate was issued and dated at Chattanooga, Tennessee, on the 23rd day of May, 1895.

V.

On the 25th day of April, 1895, the same day on which he applied for the stock aforesaid, the said William H. Denson also made and signed a written application, addressed to petitioner's President and Board of Directors at Chattanooga, Tennessee, in and by which he stated that he owned fifty shares of petitioner's stock, on which he desired a loan of $2,500, and offered a premium of $2,500 for said loan, and proposed to secure said loan and premium by a mortgage or deed of trust on certain real estate in Gadsden, Alabama, described in said application. He further stated in said application, that he wanted said loan for the purpose of removing encumbrances on said real estate and to pay debts; that the value of said real estate was $9,000; that he would assign insurance to the amount of $3,000 as additional security for said loan, and would pay attorney's fees for investigating the title to said real estate, and the expense of recording the deed of trust which he proposed to give and other necessary documents. This application was delivered by said Denson to petitioner's said soliciting agent at the same time that the application for stock was delivered, and was forwarded to petitioner by said soliciting agent at the same time.

VI.

The said Denson, having become a stockholder in petitioner in the manner hereinbefore set forth, his said application for a loan was submitted to petitioner's Board of Directors, along with other similar applications, at its home office in Chattanooga, Tennessee, at a stated meeting; and the bid of said Denson for said loan being the highest that was offered for the sum of money which he desired, and the sum of money for which he applied being in the treasury subject to loan, and the security offered by him being approved, said Denson became and was entitled to said loan under the terms and provisions of the statutes of Tennessee governing petitioner, and of its charter and by-laws; and his said application was granted and the loan to him was directed to be made. There-

upon a note and deed of trust were prepared at petitioner's home office aforesaid, to be signed by said Denson, evidencing said loan and the contract for the repayment thereof, which note and deed of trust were sent by petitioner to its said soliciting agent, and at the same time a check for the amount to be loaned said Denson was drawn by petitioner on the Chattanooga National Bank of Chattanooga, Tennessee, against funds which petitioner had on deposit in said Bank, and this check was forwarded by petitioner to one D. P. Goodhue, of Gadsden, Alabama, with instructions to him to deliver the same to said Denson, when Denson should execute and deliver said note and deed of trust. Petitioner had no money at this time on deposit in the city of Gadsden or the State of Alabama. The said Denson duly executed said note and deed of trust, his wife Rosa E. Denson joining him in the execution of the latter, and both were sent by mail to petitioner at Chattanooga, Tennessee; and the check aforesaid was cashed for said Denson by the First National Bank of Gadsden, Alabama, by which the check was subsequently transmitted to its correspondent at Chattanooga, Tennessee, and there paid on presentation, by the Bank on which it was drawn. The note given by said Denson as aforesaid was payable, by its terms, at the home office of petitioner, in Chattanooga, Tennessee; and it stipulated that "It is further understood that this note is made with reference to and under the laws of the State of Tennessee." Said note was dated at Chattanooga, Tennessee, on June 10th, 1895, but both it and the deed of trust aforesaid were in fact executed in Gadsden, Alabama.

VII.

The note aforesaid recited that it was given for money borrowed on fifty shares of stock in petitioner, and stipulated that if the said Denson should promptly pay the monthly interest on the $2,500 borrowed, and the monthly payments on said shares of stock until the stock became fully paid in and of the value of $100 per share, then upon the surrender of said stock to petitioner said note should be deemed fully paid and cancelled. But it was further stipulated that if said Denson should fail to pay all taxes and insurance premiums on the property covered by his deed of trust aforesaid when the same became due and payable, or if he should make default in payment of the monthly interest on his loan, or the monthly dues on his stock, or any fines that might be assessed against him in accordance with the rules and by-laws of the petitioner, for a period of six months after such payments should become due, then, at the option of petitioner, the whole indebtedness evidenced by said note, including any taxes and insurance premiums paid by petitioner, should at once become due and payable, and a foreclosure of the mortgage given to secure

payment of said note might be had and enforced; and in that event, the said Denson agreed to pay reasonable attorney's fees or commission charges for collecting any amount that might be due petitioner.

VIII.

The said Denson continued to make the monthly payments on his stock aforesaid, together with interest on the money loaned him, up to and including the payment due in August, 1896; after which time he ceased, and refused, to make any further payments; and he also failed and refused to pay the taxes and insurance premiums on the property covered by his deed of trust aforesaid as he had expressly contracted and agreed to do; and petitioner was obliged, in order to protect its security, to pay the sum of $45 for insurance premiums and $223.84 for taxes on said property. Thereupon petitioner elected to and did declare the whole indebtedness evidenced by said note, including the taxes and insurance premiums paid by it as aforesaid, due and payable; and afterwards, to wit, on the 25th day of August, 1899, petitioner filed an original bill in equity in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama against said William H. Denson and Rosa E. Denson, setting forth in substance the facts hereinbefore detailed, and praying for a decree against the said William H. Denson for the amount due on said note, and also for the amounts paid by petitioner for taxes and insurance premiums as hereinbefore set forth, and for attorneys' fees as stipulated in said note, and for a foreclosure of the mortgage or deed of trust aforesaid for payment of the entire amount due petitioner. The said Denson and wife answered said bill, and set up various defenses thereto; but on the hearing of the cause in the Circuit Court they abandoned all of said defenses except that petitioner was a foreign, or non resident, corporation; that all the transactions and contracts set out in the bill had been had and made in the State of Alabama; and that at the time said money was loaned, and said note and mortgage were executed, petitioner had not complied with or performed the conditions prescribed by the constitution and statutes of Alabama as prerequisite to the right of any foreign corporation to do business in that State; that therefore the aforesaid transactions and contracts were utterly void and unenforcible; and that for that reason petitioner was not entitled to the relief sought, or to any relief under its said bill.

IX.

The laws of Alabama referred to and relied on in said answer are as follows:

"No foreign corporation shall do any business in this State

without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State." Const. Ala., Art. 14, Sec. 4.

"Every corporation not organized under the laws of this State shall, before engaging in or transacting any business in this State, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this State and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this State." Code Ala. 1896, Sec. 1316.

"It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this State without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the State the sum of one thousand dollars."

"It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this State, for or on behalf of any foreign corporation which has not designated a known place of business in this State and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to the State the sum of five hundred dollars." Code Ala. 1896, Secs. 1318, 1319.

X.

The cause aforesaid came on for final hearing before the Hon. Chas. Swayne, Judge, etc., on the 6th day of October, 1900; whereupon it was adjudged and decreed that petitioner was entitled to have and recover of said William H. Denson the sum of $2,841.15, which was adjudged to be the aggregate of the amount due on said note and the taxes and insurance premiums paid by petitioner as aforesaid, and the further sum of $200 as attorney's fees, as stipulated in said note, the Court adjudging that the sum of $200 was a reasonable attorney's fee; and unless said sums, amounting in all to the sum of $3,041.15, together with interest thereon from the date of the decree, and all costs, were paid within ninety days from the date of said decree, the Court further decreed that the

real estate described and conveyed in said mortgage or deed of trust should be sold for payment of the same.

XI.

From the decree aforesaid the defendants appealed to the Circuit Court of Appeals for the Fifth Circuit, and in their assignments of error, briefs and argument in said Court of Appeals, defendants relied and insisted solely on the proposition that the contract sought to be enforced was illegal because of petitioner's failure to comply with the Alabama laws hereinbefore set forth. Said cause came on for trial in said Circuit Court of Appeals, before the Hon. Don A. Pardee, the Hon. A P. McCormick, and the Hon. D. D. Shelby, Circuit Judges, and an opinion was duly rendered therein on the 16th day of April, 1901, in and by which it was held that the contract sought to be enforced by petitioner was illegal and unenforcible by reason of petitioner's failure to comply with the aforesaid constitutional and statutory requirements of the State of Alabama; and the decree of the Circuit Court in the cause was reversed and the cause was remanded to that Court with instructions to dismiss petitioner's bill.

On the 8th day of May, 1901, within the time allowed by the rules of the Court, petitioner filed in said cause a petition to rehear; which, on the first day of June, 1901, was dismissed and disallowed by the Court without an opinion.

A certified copy of the entire record in said cause in the said Circuit Court of Appeals is herewith furnished, and hereto annexed, as part of this application, in conformity with Rule 37 of this Honorable Court, and the same is marked Exhibit "A."

XII.

Petitioner is advised and respectfully represents that the said judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination under and in conformity with the provisions of the Sixth Section of the Act of Congress entitled: "An Act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891. The jurisdiction of the United States Circuit Court in said cause was dependent entirely upon the opposite parties to the suit or controversy being citizens of different States, and therefore the judgment and decree of the said Circuit Court of Appeals is final, subject only to the power and authority of this Honorable Court to review the same by writ of certiorari, as provided in the sixth section of the act aforesaid.

XIII.

The contentions of petitioner made in said cause in the Circuit Court of Appeals, and here insisted on, are among others:

1. That the contracts sued on did not involve any doing of business by petitioner in the State of Alabama; but that the said Denson's contract of subscription for stock, and his contract to repay the loan to him, were made in the State of Tennessee, where his applications were considered and granted, where his note was made payable, and where the money loaned him was paid by petitioner, in accordance with his order.

2. That if the presence of petitioner's soliciting agent Kennedy in the State of Alabama was a doing of business by petitioner in that State—although it was insisted, under the authority of Beard v. The Union and American Publishing Co., 71 Ala. 60, that such was not the case—yet the contract sued on was not made by said agent or in the State of Alabama, and even if petitioner violated the laws of Alabama in sending its soliciting agent into that State, that fact would not affect or prevent the enforcement by it of a contract made by it in the State of Tennessee with a citizen of Alabama.

3. That the issuance of stock by petitioner to said Denson, which took place in the State of Tennessee, gave him a vested right to a loan, on compliance with the prescribed conditions, which right he could legally enforce against petitioner; and that the State of Alabama could not forbid the performance by petitioner of its lawful contracts.

4. That the State of Alabama had no right or power to forbid the making by its citizens of contracts outside the State and with citizens of other States, and that it had not assumed to do so.

The questions aforesaid, and other questions involved in the case are, as petitioner is advised, of great gravity and importance; and especially is it important that there should be uniformity in the decisions on such questions among the different State and Federal Courts. Yet, instead of being certain and uniform, the decisions on all of said questions are extremely confusing and conflicting; so much so that the Circuit Court of Appeals says, in its opinion in this case, that "it is impossible to reconcile them with each other." But the great weight of authority is, as petitioner most respectfully submits, against the view taken by the Circuit Court of Appeals in its opinion in this case.

Petitioner confidently believes that it is impossible to distinguish this case in principle from that of Bedford v. Eastern Building and Loan Association, decided by this Honorable Court on April 22nd, 1901, a few days after the decision of this case by the Circuit Court of Appeals, and reported in 181

U. S. 227. The principle decided in that case, as petitioner understands it, was that the appellant's subscription to stock in the association, having been made prior to the passage of the statutes relied on as a defense, was not affected or rendered void by those statutes; and that by virtue of his stock subscription, appellant became entitled to exact performance of the requirements of the by-laws and charter of the association, and therefore acquired a vested right to a loan, which loan it was the duty of the association to make, and which the legislature had not the power to forbid.

In the present case, the appellant Denson became a member and stockholder in petitioner, not through any doing of business by petitioner in the State of Alabama, but by the issuance of stock to him in the State of Tennessee. Having, then, become a stockholder in petitioner by a lawful and unimpeachable transaction, said Denson became legally entitled to obtain a loan whenever the requisite conditions existed; and this was a vested right, which he could have enforced against petitioner and therefore "it was properly yielded to without suit and possessed all legal sanctions." In its petition to rehear in this case, petitioner cited and relied on the opinion of this Honorable Court in the Bedford case aforesaid; but as the Court of Appeals filed no opinion, in dismissing the petition to rehear, petitioner is unable to say what view that Court took of the Bedford case, or on what ground it distinguished that case from this one.

As further evidence of the conflict of opinion on the questions involved in this case, and of the weight of authority against the opinion of the said Circuit Court of Appeals, petitioner respectfully calls the attention of this Honorable Court to the fact that the opinion of the Hon. E. S. Hammond, District Judge, in the case of Eastern Building & Loan Association v. Bedford, the same case decided by this Court on April 22nd, 1901, as hereinbefore set forth, is hopelessly in conflict with the opinion of the Court of Appeals in this case; that the learned Judge who tried this cause in the Circuit Court was of the opinion that petitioner was entitled to recover, notwithstanding the laws relied on; that the Hon. William Lochren, in the Circuit Court for the District of Minnesota, in an opinion in the case of Sullivan v. Sheehan, reported in 89 Fed. Rep. 247, held that statutory provisions similar to those involved in this case did not apply to or invalidate a contract such as is here presented; that the Supreme Court of North Dakota, in the case of United States Savings and Loan Co. v. Shain, 8 North Dakota, 136, has announced an opinion sustaining the contention of petitioner in this case, and wholly at variance with the said opinion of the Circuit Court of Appeals; that the Hon. Charles H. Simonton, in the case of Guaranty Savings, Loan & Investment Co. v. Alexander, in the Circuit Court for the District of South Carolina, in an opinion reported in 96 Fed. Rep. 870,

has also held in accordance with petitioner's contention; and that the Circuit Court of Appeals for the Sixth Circuit was in such doubt, and deemed the questions of such importance and gravity, that it certified to this Honorable Court in the said case of Bedford v. Eastern Building & Loan Association, the identical questions upon the determination of which this case depends.

And petitioner most respectfully submits, further, that the opinion of this Honorable Court in Allgeyer v. Louisiana, 165 U. S. 578, is conclusive of the questions on which this case must be determined. If, as held in that case, a citizen of a State has a right, of which the State government cannot deprive him, to make a contract outside the State, with residents of other States, while he himself remains in the State of his domicile, then it is most earnestly contended that the contract involved in this case was one which the parties had the right to make, and which the State of Alabama could not forbid.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled William H. Denson and Rosa E. Denson, plaintiffs in error, *versus* Chattanooga National Building & Loan Association, defendant in error, being No. 1028 on the docket of said Court, to the end that said cause may be reviewed and determined by this Court, as provided in Section Six of the Act of Congress hereinbefore cited and referred to; or that petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate, and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,

By PRITCHARD & SIZER,
Attorneys, Solicitors and Counsellors for Petitioner.

ROBERT PRITCHARD,
J. B. SIZER,
Of Counsel for Petitioner.

STATE OF TENNESSEE, }
HAMILTON COUNTY. } ss.

J. B. Sizer, being duly sworn, says that he is one of the attorneys and solicitors and of counsel for Chattanooga National Building & Loan Association, the petitioner above named, and as such had personal charge for petitioner of the case in the foregoing petition mentioned, in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, and in the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the said petition; and that the facts therein stated are true to the best of his information and belief.

J. B. SIZER.

Sworn to and subscribed before me this 29th day day of November, 1901.

NORRIS HEADRICK,
Notary Public.

[Seal]

2573
Office Supreme Court U.S.
FILED
DEC 7 1901
Clerk.

No. 206
Brief of Pritchard & Sizer
492
Filed Dec. 7, 1901.

Brief for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, PETITIONER,

vs.

WILLIAM H. DENSON AND ROSA E. DENSON, RESPONDENTS.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

ROBERT PRITCHARD AND J. B. SIZER, COUNSEL FOR PETITIONER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Ex Parte CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,

Petitioner.

BRIEF FOR PETITIONER.

I.

That the contract sued on in the original bill was made in the State of Tennessee, and not in the State of Alabama, is a proposition as to which, it is respectfully submitted, there can be no reasonable doubt. Denson made a written application for a loan from petitioner; and while he wrote and signed this application in the State of Alabama, it did not constitute a contract until his proposition was accepted; and this acceptance took place in the State of Tennessee.

"Where the transaction consists in a proposition from one party and an acceptance from the other, the law * * * * is that of the place to which the proposition is sent and from which the receiver forwards his assenting reply. *It is at this place that the purposes of the parties for the first time coalesce.*"

Wharton on Conflict of Laws, Sec. 421.

The principle is involved and settled in the cases of:

Tayloe v. Merchants' Fire Ins. Co., 9 How. 390;
Holder v. Aultman, 169 U. S. 81;
Western v. Genessee Mut. Ins. Co., 12 N. Y. 258;
Allgeyer v. Louisiana, 165 U. S. 578.

In Holder v. Aultman, supra, this Court said that it was "at Akron, in the State of Ohio, that the contract was approved by the plaintiff's secretary at its principal office, and then and there, *for the first time*, became a valid and binding contract between the parties. It cannot, therefore, be considered as 'made' within the statute in question, *at any earlier time, or other place.*"

In Tayloe v. Merchant's Fire Ins. Co., supra, the Court said that "on acceptance of the terms proposed, transmitted by due course of mail to the company, *the minds of both parties have met on* the subject, in the mode contemplated at the time of entering upon the negotiation, *and the contract becomes complete.*"

9 How. 400.

It is true that the question directly involved in that case was not *the place where*, but the *time when* the contract was made; but if it was made *when* the proposition of the one party was accepted by the other, then necessarily it was made *where* that acceptance took place.

In Western v. The Genessee Mutual Ins. Co., supra, the Court said:

"When the application was received and approved by the company, and the policy executed and put in course of transmission to the insured, the contract was complete and both parties became bound. * * * *

"The contract was consummated *by the final assent on the part of the company.*"

II.

The State of Alabama had no right to forbid the making by its citizens of contracts outside the State, and with citizens of other States, or to interfere with or prohibit the performance of such contracts.

"Has not a citizen of a State, under the provisions of the provisions of the Federal Constitution above mentioned, a right *to contract outside of the State* for insurance" [or for a loan] "on his property—a right of which State legislation cannot deprive him? We are not alluding to *acts done within the State by an insurance company or its agents doing business therein*, which are in violation of the State statutes. * * * When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, *where the contract was made outside the State, and as such was a valid and proper contract.* * * * * * *

"The mere fact that a citizen may be within the limits of a particular State, does not prevent his making a contract outside its limits, while he himself remains within it."

Allgeyer v. Louisiana, 165 U. S. 578, 590, 591, 592.

It follows, we think, that the State of Alabama had no power to prevent Mr. Denson from subscribing for stock and becoming a stockholder in the petitioner; and it is very clear that the provisions of the constitution and statutes of Alabama, quoted in the petition and in the opinion of the Circuit Court of Appeals, have no application whatever to the transaction by which Mr. Denson became a stockholder in petitioner.

III.

The petitioner is chartered and organized under the public statutes of Tennessee authorizing the creation of corporations for carrying on the business of building and loan associations; and the loan in controversy was made in accordance with the

power conferred on petitioner by its charter, and in the manner prescribed by its by-laws.

Stipulation, Record p. 75.

The statutes under which petitioner was chartered and organized provide that the money in the treasury shall be offerred for loan at stated meetings of the board of directors and that "the stockholder who shall bid the highest premium for the preference or priority *shall be entitled* to receive a loan of two hundred dollars for each share held by such stockholder."

Shannon's Code of Tennessee, Secs. 2136, 2151, 2177;
Tennessee Acts 1875, Ch. 142, Sec. 14;
Tennessee Acts 1889, Ch. 267, Sec. 1;
Tennessee Acts 1893, Ch. 12, Sec. 1.

The bid of Mr. Denson was the highest that was offered for the sum of money which he desired, at the meeting at which his application was presented, and the security offered by him was satisfactory.

Record, p. 24.

He therefore became entitled, by virtue of his contract of membership, to obtain the loan; he acquired a vested right to it, which he could have enforced against the association by suit; and being a right which could have been enforced by suit, the association properly yielded to it without suit, and the State of Alabama had no power or right to interfere with the performance of such a contract.

While the power of the States to impose conditions upon foreign corporations doing business within their limits is recognized and undisputed, "manifestly it cannot be exercised to discharge the citizens of the State from their contract obligations."

We submit that the case is directly within the principle decided by this court in Bedford v. Eastern Building and Loan Association, 181 U. S. 227.

IV.

Even if the taking of the note and mortgage and payment of the money loaned to Denson could be held to constitute doing business by the Association in Alabama, the Association would still be entitled to collect the indebtedness sued on, under the doctrine of the Bedford case, supra. But it is submitted that neither the taking of the note and mortgage or the payment of the money, constituted a transaction of business by the Association in Alabama.

The note and mortgage were drawn in Tennessee, and by their express terms were payable there. The note is dated in its face at Chattanooga, Tennessee, and expressly stipulates

that it "is made with reference to and under the laws of the State of Tennessee."

Record p. 8.

The money was paid by a check drawn in favor of Mr. Denson on a bank in Chattanooga, Tennessee; and while Mr. Denson got the money on it from a Gadsden bank, it was not paid by the Association until presented at the Chattanooga bank on which it was drawn.

Record, p. 24.

The petitioner's part of all these transactions was performed in the State of Tennessee; and only those acts which the borrower was required to do *as a condition precedent* to the loan of the money to him, were performed in Alabama.

The place of the note itself was the State of Tennessee, where it was to be paid, and by the laws of which the parties agreed it should be construed and governed.

Wharton on Conflict of Laws, Secs. 389, 399;
Andrews vs. Pond, 13 Peters, 65, 78;
Pritchard vs. Norton, 106 U. S. 124;
London Assurance vs. Companhia De Moagens. 167 U. S. 149, 160.

The mortgage is a mere incident to the debt, and its situs is that of the debt which it secures although it may cover property located elsewhere.

Lauter v. Jarvis-Conklin Mortgage Trust Co., 85 Fed. Rep. 894, 896;
Pioneer Bldg. & Loan Asso. v. Cannon, 96 Tenn. 599;
Sullivan v. Sheehan, 89 Fed. Rep 247;
Electric Lighting Co. of Mobile v. Rust, 117 Ala. 680;
U. S Savings and Loan Association v. Shain, 8 North Dakota, 136.

V.

The only representative the petitioner had in Alabama at the time this loan was made was a traveling soliciting agent who was employed to solicit subscriptions to petitioner's stock.

It is submitted that the case of Beard v. The Union & American Publishing Co., 71 Ala. 60, is direct authority in support of the proposition that the transactions of this agent did not constitute a doing of business in Alabama by the petitioner within the meaning and inhibition of the laws relied on.

But if we are mistaken in this, it is fully shown that the contracts involved in this suit *were not made* by this soliciting agent, and that he had no part in the transactions culminating in the loan except to transmit the papers back and forth. It is insisted, therefore, that even if the Association infringed the laws of Alabama by sending this soliciting

agent into the State, and thereby made itself amendable to the penalties prescribed for violation of the laws, it did not on that account forfeit the right to enforce contracts which it made in the State of Tennessee, with citizens of Alabama. The utmost extent to which the Alabama courts have gone in construing these laws is to hold that contracts made *in Alabama* by non-resident or foreign corporations, without compliance with the laws, are unenforcible.

VI.

The Circuit Court of Appeals says in its opinion that "it is perfectly clear that all the business of loaning money to Denson, *with the single exception that the Association in Tennessee said 'Yes,'* was transacted in Alabama."

Record, p. 64.

Conceding that this view of the case is correct, it is respectfully submitted that it sustains our contention that the contract sued on was made in Tennessee, and therefore was not a doing of business in Alabama. For there was no contract until the association said "yes" to Denson's application; and *when* and *where* it said "yes," *then* and *there* was the contract made. We think the proposition is fully sustained by the authorities cited under paragraph I. of this brief.

With all deference to the opinion of the learned Court of Appeals, it is respectfully submitted that it has been misled to the conclusion that this contract is unenforcible by overlooking the point suggested in paragraph V. of this brief; namely, that it is immaterial, so far as this case is concerned, if the association was illegally doing business in Alabama when this loan was made, unless *the very contract here sued on* was made in that State. The State of Alabama has not undertaken to prohibit the enforcement by the association of its contracts lawfully made in the State of Tennessee, as a penalty for the illegal transaction by it of business in the State of Alabama; nor could it do so.

It is further submitted that the Court of Appeals is mistaken in the statement that the payment of the money loaned took place in Alabama. The undisputed evidence is that the association had no money in the State of Alabama at the time the check in favor of Denson, for the amount loaned him, was drawn; and that the money was paid by the Chattanooga bank on which it was drawn, out of funds on deposit therein belonging to the association.

Record, p. 24.

It is true the cashier of the Gadsden bank, by which the check was cashed for Denson, says that his best recollection is that he paid the money on the check "under an understanding with the said building and loan association, and that the Chattanooga National Bank, on which the check was

drawn, would pay the same on presentation." He further says that he "transmitted the check to our Chattanooga correspondent and the same was paid"; and that he paid the money to Denson on this check "as on any other negotiable exchange."

Record, pp. 58, 59.

But this evidence, instead of in any way contradicting, directly sustains and corroborates the contention that the association paid over the sum of money which it had agreed to lend Denson, in the State of Tennessee. The Gadsden bank, understanding from the association, or the Chattanooga bank, or both, that the check would be paid on presentation, was willing to, and did, take it and advance the money on it "as on any other negotiable exchange"; and the check was then forwarded to Chattanooga and paid to the person by whom it was presented, in accordance with the order of Denson, the original payee.

It is further submitted that the apprehension, expressed by the Court of Appeals, that this and other foreign corporations of the same kind "may safely flood the State of Alabama with soliciting agents, make all the negotiations for loans, take real estate securities therefor and fully transact all other business pertaining to their corporate functions as though incorporated therein" without complying with the requirements of the Alabama laws, should not be of controlling force in the determination of this case. The penalties imposed for violation of the laws in question are ample and stringent; and no reason is apparent why the courts should seek to add to the severity of the laws by reading into them additional penalties. But if the Courts have power in their discretion to impose additional penalties to those prescribed by the statutes, it is submitted that the fact that the violation of the laws, if they have been violated, shown in the present case was not wanton or wilful, but was due wholly to the ignorance on the part of the officers of the association of the laws of a foreign State, is a sufficient reason, especially in a court of equity, why that discretion should not be exercised.

Respectfully submitted,

ROBERT PRITCHARD,

J. B. SIZER,

Of Counsel for Petitioner.

Office Supreme Court U. S.
FILED
OCT 31 1902
JAMES H. MCKENNEY,
Clerk.

No. 206.

W. G. Prichard for Petitioner.

BRIEF FOR PETITIONER.

Filed Oct. 31, 1902.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 206.

THE CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,

vs.

WILLIAM H. DENSON AND ROSA E. DENSON.

QUESTIONS FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

ROBERT PRITCHARD AND J. B. SIZER,
COUNSEL FOR PETITIONER.

(16,345)

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 206.

THE CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, PETITIONER,

vs.

WILLIAM H. DENSON AND ROSA E. DENSON.

STATEMENT, ASSIGNMENT OF ERRORS AND BRIEF OF COUNSEL FOR PETITIONER.

STATEMENT OF CASE.

The original bill in this cause was filed in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama to collect an alleged indebtedness of defendants to complainant and to foreclose a deed of trust or mortgage given to secure payment of said indebtedness.

Record, pp. 1–10.

The defendants in their answer denied most of the allegations of the bill and set up various matters of defense, but the only defense insisted on, and the only one involved in this Court, is the one set up in the ninth paragraph of the answer; namely, that the complainant was a foreign corporation, not organized under the laws of Alabama, that the transaction sued on involved a doing of business by it in the State of Alabama, that it had not complied with certain requirements prescribed by the constitution and statutes of Alabama for foreign corporations doing business in that State, and that therefore the loan and mortgage sued on were void and unenforceable.

Record, pp. 18–19.

The Circuit Court rendered decree in favor of complainant for the sum of $2,841.15, which it adjudged to be the balance due from defendants on the note sued on, and $200 attorney's fee, and ordered sale in foreclosure of the mortgage given to secure the note

unless the amount adjudged in favor of complainant, with interest and costs, should be paid within ninety days from entry of the decree.

Record, pp. 53–56.

The defendants filed a petition for appeal, and in support thereof assigned twenty-one errors in the decree of the Circuit Court, all of which, except the twenty-first, were predicated on the proposition that the loan, note and mortgage sued on were void because they involved a doing of business in the State of Alabama without compliance with the constitutional and statutory requirements of that State. The twenty-first error assigned is that the Court erred in decreeing sale in bar of the dower right of Mrs. Rosa E. Denson.

Record, pp. 56–60.

The Circuit Court of Appeals held that the note and mortgage sued on were illegal and unenforceable because of the failure of complainant to comply with the Alabama laws, and reversed the decree of the Circuit Court and remanded the case with instructions to dismiss the bill.

Opinion Circuit Court of Appeals, record pp. 68, 73.

Decree Circuit Court of Appeals, record p. 65.

Complainant thereupon filed a petition in this Court for a writ of certiorari under the sixth section of the Circuit Court of Appeals act, which petition was granted.

Record, p. 74.

The petitioner is a corporation organized under the statutes of the State of Tennessee, authorizing the creation of corporations for carrying on the business of building and loan associations. Its principal office and place of business was at the time the loan in controversy was made and at the time the suit was brought, and continuously between those dates, in the city of Chattanooga, Tennessee. The loan in controversy was made "in accordance with the power and authority conferred on complainant by its charter and in the manner prescribed by its by-laws."

Stipulation, record, p. 64.

The defendants were at the time the loan was made and at the time the suit was brought, and continuously between those dates, citizens and residents of the State of Alabama.

Petitioner, at the time the loan was made, had no local office or agent in Alabama, but it had in its employ a traveling agent named Kennedy, whose business it was to solicit subscriptions to stock, and submit applications for loans.

On April 25th, 1895, defendant, W. H. Denson, at Gadsden, Alabama, signed a written application for fifty shares of stock in petitioner, which application was forwarded by the petitioner's traveling agent, Mr. Kennedy, to petitioner's home office in Chattanooga, Tennessee, where the stock was issued on May 23rd, 1895, in accordance with the application, and was returned to Mr. Kennedy to be by him delivered to said Denson.

Ex. Nos. 2 and 3 to Denson's dep., Rec. pp. 45, 46.

Stipulation, Rec. p. 20.

On the same day on which he applied for his stock, Mr. Denson also signed a written application, addressed to the president and board of directors of petitioner at Chattanooga, Tennessee, for a

loan of $2500 on the fifty shares of stock he had applied for. He offered a premium of $2500 for the loan, and proposed to secure the loan and premium, if his application should be granted, on certain real estate in Gadsden, Alabama, which he represented in the application was of the value, in all, of about $9000. This application was accompanied by the report of two disinterested parties, fixing the value of the property which Denson proposed to mortgage at $8000, and the certificate of a local attorney with reference to the condition of the title.

Ex. No. 4 to Denson's dep., record, pp. 48–51.

This application, with the other papers accompanying it, was submitted to petitioner's board of directors in Chattanooga, Tennessee, at a stated meeting, along with other applications of a similar nature, whereupon said application was duly considered and granted and the loan was directed to be made. The note and deed of trust in question were then prepared at Chattanooga, Tennessee, and forwarded to the agent, Kennedy, through whom the application had been submitted, and at the same time a check for the amount of the loan was drawn by petitioner on the Chattanooga National Bank, of Chattanooga, Tennessee, in favor of defendant W. H. Denson, and was sent to a man named Goodhue, in Gadsden, Alabama, with instructions to him to deliver the check to Mr. Denson when he and his wife should have executed the note and deed of trust. Petitioner had no money on deposit in the State of Alabama at this time; and the check to defendant Denson, having been delivered to him on the execution of the note and mortgage, was subsequently presented, with his endorsement, at the bank on which it was drawn, and was there paid out of funds on deposit in said bank belonging to petitioner.

Rec. pp. 20–21.

Ex. No. 1, dep. of W. H. Denson, Rec. p. 45.

Certain deductions were made from the $2500 borrowed by Mr. Denson and the check was for $2367.50, the net amount to which he was entitled. The propriety of these deductions was not seriously controverted in the Circuit Court, and was not challenged by the assignment of errors filed by defendants with their petition for appeal; and it is not deemed necessary to discuss that question here.

With reference to payment of the check, it further appears that Mr. Denson cashed it at the First National Bank of Gadsden, Alabama. The cashier of that bank says that his best recollection is that he "paid the money on the check under an understanding with the said building and loan association, and that the Chattanooga National Bank, on which the check was drawn, would pay the same on presentation." He further says that the money was paid by his bank to Mr. Denson on this check, "as on any other negotiable exchange."

Rec. p. 51

In other words, Mr. Denson transferred the check by endorsement to the First National Bank of Gadsden, and received from that bank the amount of money the check called for; and then this bank, as the holder and owner of the check, forwarded it to Chattanooga and collected it from the bank on which it was drawn.

At the time the loan here in controversy was made the complainant association had been for some time soliciting subscriptions to its stock in the State of Alabama, through traveling agents, and had received, through such agents, several other applications for loans from residents of Alabama, which applications had been submitted and acted on in the same manner as the Denson loan, and several others had been granted, and loans made on them, prior to the date of this transaction. Complainant had paid the tax or license fee required by the laws of Alabama from foreign corporations doing or proposing to do business in that State, and its officers supposed and understood that the payment of this fee or tax entitled them to do business in Alabama, without more. Subsequently, and some months after the loan to Denson was made, complainant's officers were informed by an Alabama attorney of the other statutory and constitutional requirements invoked by the defendants in this case, and thereupon it promptly complied with them.

Rec. pp. 21–22.

These requirements or provisions are as follows:

"4. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon any agent anywhere in this State." Const. Ala., Art. XIV.

"1316. Foreign corporations must file instrument of writing designating agent and place of business in this State. Every corporation not organized under the laws of this State, shall, before engaging in or transacting any business in this State, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this State and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this State." Code Ala., 1896.

"1318. Unlawful for foreign corporation to transact business in this State before declaration filed; penalty. It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this State without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the State the sum of one thousand dollars." Ib.

"1319. Unlawful to act as agent of foreign corporation before such declaration is filed; penalty. It is unlawful for any person to act as agent or transact any business directly or indirectly, in this State, for or on behalf of any foreign corporation which has not designated a known place of business in this State and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to

the State the sum of five hundred dollars." Ib.
Record, pp. 68–69.

ASSIGNMENT OF ERROR.

1. The Circuit Court of Appeals erred in holding that the loan to defendant Denson sued on in this case involved a doing or transacting of business in the State of Alabama by the petitioner, within the spirit and intent of the Alabama laws relied on.
2. If the loan did involve the transaction of business in the State of Alabama by petitioner, it was nothing more than the carrying out of a contract lawfully made in the State of Tennessee; therefore the Circuit Court of Appeals should have held that petitioner was bound to comply with the terms of this contract, even if it had to go into the State of Alabama to do so, and that the State of Alabama had no right or power to interfere with the performance of such contract.
3. The Circuit Court of Appeals should not have held the note and mortgage unenforcible, and directed the dismissal of the bill, even if the transaction was in violation of the Alabama laws and the State of Alabama had the power to forbid it.

BRIEF.

I.

THE CONTRACT FOR THIS LOAN WAS MADE IN TENNESSEE.

The petitioner's agent, to whom Mr. Denson submitted his application for the loan, had no authority to grant the application and make the loan, and did not assume to do so. He forwarded the application to Chattanooga, Tennessee, and it was there acted on and granted. Where, then, was the place of the contract?

Manifestly not in Alabama, for the *making of the application* did not constitute a contract; nor did the *delivery of it* to petitioner's traveling agent; or the *mailing of it* by that agent to Chattanooga.

It would seem clear, then, that until this application *was granted* there was no contract, for there was no meeting of minds. There was a mere proposition, which might have been withdrawn at any time before its acceptance, and which might be either accepted or rejected by the association. And inasmuch as it took this acceptance of defendant's proposition to *make the contract*, it must be that the contract is made where that acceptance takes place; and so the authorities hold.

"Supposing that the parties to an alleged contract are living, at the time of the contract, in different places, and that they negotiate by letter, the question arises which place, in case of conflict, is to be regarded as giving the applicatory law. Where the transaction consists in a proposition from one party and an acceptance from the other, the law, Savigny answers, is that of the place to which the proposition is sent, and from which the receiver forwards

his assenting reply. *It is at this place that the purposes of the parties for the first time coalesce.*"

Wharton on Conflict of Laws, § 421.

In *Allgeyer v. Louisiana*, 165 U. S. 578, the plaintiff in error, a resident of Louisiana, while in that state made a contract for insurance with a New York corporation, which issued him what is known as an open policy, covering generally cotton in bales purchased and shipped by him, etc. The policy provided that shipments applicable to it must be reported to the insurance company by letter addressed to its president, stating the name of the vessel, particulars of the shipment, etc., and that until such letter should be deposited in the post office no risk should attach. On each risk a new and separate policy was to be issued and delivered to the insured at New Orleans. The insured in Louisiana mailed this letter of notification addressed to the company in New York, the property insured being at the time in Louisiana. It was conceded in the case that the contract of insurance was made in the State of New York, where the policy was issued and the premiums paid.

In *Holder v. Aultman*, 169 U. S. 81, a written contract was signed by the plaintiff and by the agent of the defendant, in the State of Michigan. It contained a proviso, however, that it was not to be valid unless countersigned by the manager of defendant at Lansing, Michigan, and *approved at Akron, Ohio.* The paper was subsequently countersigned and approved as required by this proviso; and it was held that the contract was not made in Michigan, but in Ohio. The court says that it was "at Akron, in the State of Ohio, that the contract was approved by the plaintiff's secretary at its principal office, and then and there, for the first time, became a valid and binding contract between the parties. It cannot therefore be considered as 'made' within the meaning of the statute in question, at any earlier time, or other place."

In *Western v. The Genesee Mutual Insurance Co.*, 12 N. Y. 258, certain residents of Bellville, Canada, executed and delivered at that place to one Patterson, an agent for the defendant insurance company, an application for a policy of insurance on certain property located in Bellville, and at the same time paid to Patterson the cash premium for the insurance which they desired to obtain, and also executed and delivered to him a premium note, payable to defendant. The application, cash and note were forwarded to the home office of defendant in the State of New York, where the policy was executed and forwarded to Patterson, who delivered it to the assured. It was held that the contract was made in the State of New York.

"When the application was received and approved by the company, and the policy executed and put in course of transmission to the insured, the contract was complete and both parties became bound. * * * * * * * * * *

"The contract was consumated by the final assent on the part of the company."

In *Tayloe v Merchants' Fire Ins. Co.*, 9 How. 390, a written application was made by the plaintiff through a local agent at Fredericksburg, Virginia, of an insurance company whose home office was in Baltimore, Maryland, for a policy of insurance on certain

property in Virginia. The application was forwarded by the local agent to the office of the company at Baltimore, and a few days later the secretary of the company wrote a letter to the local agent acknowledging receipt of the application and stating that "Mr. Tayloe's risk will be taken at the same rate as Mr. Bernard's," &c. Before the premium was paid or the policy was delivered, the property was burned; and the company resisted payment on the ground that there was no completed contract of insurance. The court held, however, that "on the acceptance of the terms proposed, transmitted by due course of mail to the company, *the minds of both parties have met* on the subject, in the mode contemplated at the time of entering upon the negotiation, *and the contract becomes complete.*"

9 How. 400.

It is true that the question directly involved in that case was not the *place where*, but the *time when* the contract was made; but if it was made *when* the proposition of the one party was accepted by the other, then necessarily, it was made *where* that acceptance took place.

In the case of *Glover v. Equitable Mortgage Co.*, 87 Fed. Rep. 518, the contract for the loan was made in the State of Mississippi, where the loan company was located, although the note and mortgage were executed in Tennessee, where the borrower resided. This court held in an opinion delivered by Judge Pardee that the loan was made in the State of Mississippi.

"The agreement to make the loan on the security offered—*the meeting of minds*—was in the State of Mississippi, and it is clear from the evidence that the parties intended it should be a Mississippi contract."

See also the same effect:

State Mutual Fire Ins. Co. v Brinkley S. & H. Co., 61 Ark. 1;
Garrettson v. North Atchison Bank, 47 Fed. Rep. 867.

If the *contract* for the loan in this case was made in the State of Tennessee, then we submit the further proposition that the giving of the note and mortgage and payment of the money in pursuance of this contract, even if it could be held to be an Alabama transaction, would not render the loan a doing of business in Alabama by the complainant within the purview of the laws in question. As was said in the *Allgeyer* case, *supra:*

"We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York. * * * The letter of notification did not constitute a contract made or entered into within the State of Louisiana. *It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside the state.*"

165 U. S. 588.

In the case of Hyde v. Goodnow, 3 N. Y. 266, an agent residing in Ohio, of an insurance company domiciled in the State of New York, received from a resident of Ohio an application for a policy, together with a note for the premium, and transmitted both to the office of the company in New York, where they were received,

passed upon and approved, and the policy was issued and transmitted to the applicant by mail. An Ohio statute in force at the time provided that no policy of insurance should be signed, issued or delivered in the State, or on property located therein, by any foreign corporation, except by an agent of such corporation who shall have obtained license as such; and that every policy issued or delivered contrary to the provisions of the act should be null and void. Suit being brought on the note given for the premium on this policy, the defense was that the agent of the insurance company had not obtained the license required by the Ohio statute, that therefore the policy of insurance was illegal and the notes given for the premium on the policy were without consideration.

The Court held, however, that the contract was not made in Ohio, but in New York, and that the statute had no application.

"The applications of the defendant for insurance could in no sense have been regarded as a contract until they had been accepted by the company. The agent did not assume to do anything which would bind the company. His office was to receive, and submit to the company, the defendant's propositions. Until the company acted upon such propositions, it was within the defendant's power at any time to recall them. Before the company had agreed to insure, the defendant, notwithstanding the execution and delivery of the notes and applications to the agent of the company, might have withdrawn his applications and upon his doing so, his notes would have been inoperative. Until then, the transactions were wanting in that mutuality which is essential to a valid contract. But when the company, having received the applications, accompanied with the notes, consented to insure, and issued its policies, what was before revocable became irrevocable. What was before a mere proposition, then became invested with the attributes of a contract, and from that time each party became bound for its performance. If this be so, the contracts are to be regarded as having been made when the company received and accepted the defendant's applications and issued and transmitted to him their policies. Of course they were contracts made in the State of New York, and not in Ohio."

3 N. Y. 270.

II.

THE TAKING OF THE NOTE AND MORTGAGE AND THE PAYMENT OF THE MONEY DID NOT CONSTITUTE A TRANSACTION OF BUSINESS IN ALABAMA BY THE PETITIONER.

As already stated, this note and mortgage were drawn up in Tennessee, and mailed to petitioner's traveling agent, to be by him delivered to Mr. Denson for execution. When executed, Mr. Denson then delivered the papers to one D. P. Goodhue, who had no connection with petitioner, and to whom petitioner had mailed its check payable to Mr. Denson for the amount of the loan, with instructions to Mr. Goodhue to deliver the check to Mr. Denson, when he should have properly executed the papers. The papers were

then sent to petitioner and the check was paid in the City of Chattanooga, by the bank on which it was drawn.

The only part which petitioner took in this transaction, was the payment of the money which Mr. Denson had borrowed from it; and that took place, confessedly, in the State of Tennessee. The fact that Mr. Denson signed in Alabama the papers necessary to procure the loan does not, as we submit, constitute a doing of business in Alabama by the petitioner.

On this proposition the case of *Holder v. Aultman*, *supra*, is in point. There the contract in controversy was fully executed by one of the parties, and delivered to the agent of the other, in the State of Michigan; but inasmuch as the final approval of the other party was given in another state the Supreme Court held that the contract was not made in Michigan. So in this case, considering the execution of the papers and the payment of the money as a separate transaction from the contract for the loan, the petitioner's part of this transaction—the drawing of the check and payment of the money—was performed in the State of Tennessee; and only those acts which the borrower was required to do *as a condition precedent* to petitioner's act, were performed in the State of Alabama.

But furthermore, we contend that in contemplation of law, the place of the note itself was the State of Tennessee, and not the State of Alabama.

The note expressly stipulates that it "is made with reference to and under the laws of the State of Tennessee."

Ex. "A" to Bill, Rec. p. 7.

"It is true that the place in which the obligation has its inception may be agreed upon by the parties as supplying the local law by which it is to be governed. But this is not from the force of the original local connection because the obligation may have, *from its very terms, its actual seat in another locality.* It is different, however, with the place of performance, which enters into the vitals of the obligation, so far as concerns its fullfillment. * * * To this place * * * the intentions of both parties converge."

Wharton on Conflict of Laws, §§ 398, 399.

"The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance."

Andrews v. Pond, 13 Peters, 65, 78.

See also

Pritchard v. Norton, 106 U. S. 124.

The reason of this rule is, that the place of performance is presumed to be that which is in the contemplation of the parties when they make the contract; their "intentions converge" there; and in their minds they fix that as *the place of the agreement* In other words, the law fixes the place of the contract in accordance with the *presumed intention* of the parties. If, then, the intention of the parties is not left to presumption, but is expressly stated, it would seem that the law would locate the contract in accordance with that expressed intention, especially when it coincides with what the law would presume, in the absence of any expression.

We think the question is controlled by the same principle on

which is based the well known and well established rule that the parties to a note may, if they act in good faith, contract for a rate of interest which is valid either at the place where the note is made or where it is payable. The rule, as all the cases show, is based on the principle that the parties are presumed to contract with reference to that law under which the contract would be valid, rather than that under which it would be void, and the law simply gives effect to this presumed intention.

Wharton on Conflict of Laws, § 507;
Andruss v. People's B'ld'g, Loan and Savings Asso., 94 Fed. Rep. 575;
Dugan v. Lewis, 79 Tex. 246;
Andrews v. Pond, 13 Peters, 65;
Glover v Equitable Mortgage Co., 87 Fed. Rep. 518;
Eastern B. & L. Asso. v. Bedford, 88 Fed. Rep. 7.

If, then, the parties expressly stipulate that a contract is to be governed by the laws of the place of performance, under which it would be valid, no reason is apparent why the law should not as readily give effect to their expressed intention, as it would to their presumed intention where none is expressed, or why the intention of the parties, expressed or implied, should not be given as much weight on any other element of the contract, as on the question of interest.

In the case of *London Assurance v. Companhia DeMoagens*, 167 U. S. 149, 160, the Supreme Court said:

"Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in England.

* * * * * *

"Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, section 280 says: 'But where the contract is, either expressly or tacitly, to be performed in any other place, then the general rule is, *in conformity to the presumed intention of the parties*, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. *This would seem to be a result of natural justice.*'"

And in *Penn. Mutual Life Ins. Co. v. Mech. Sav. Bank & Trust Co.*, 72 Fed. Rep. 413, the Circuit Court of Appeals for the Sixth Circuit held that the stipulation of the parties that "the place of the contract shall be the city of Philadelphia, State of Pennsylvania" was controlling.

The mortgage is a mere incident to the debt, and its situs is that of the debt it secures although it may cover property elsewhere

Lauter v. Jarvis-Conklin Mortgage Trust Co., 85 Fed. Rep. 894, 896;
Pioneer B. & L. Asso., v. Cannon, 96 Tenn. 599;
Sullivan v. Sheehan, 89 Fed. Rep. 247;
Electric Lighting Co. of Mobile v. Rust, 117 Ala. 680;
U. S. Sav. & Loan Asso. v. Shain, 8 North Dak. 136.

III.

PETITIONER'S TRANSACTIONS IN ALABAMA.

The only representative petitioner had in Alabama at the time this loan was made was a traveling soliciting agent, who was employed to solicit subscriptions to stock and submit applications for loans.

The case of *Beard v. The Union and American Pub Co.*, 71 Ala. 60, is direct authority in support of the proposition that the transactions of this agent did not constitute a doing of business in Alabama by petitioner within the meaning and inhibition of these laws.

"The mere presence of an agent within the State, authorized to transact particular business not involving an exercise of the corporate powers or franchises, not a part of the business the corporation was created and organized to transact, is not within the proper meaning of the phrases 'do business' or 'does business' as employed in the constitution and the statutes. * * * *

"There are many acts of business a foreign corporation may do without coming within the constitutional or statutory provision."

Sullivan v. Sullivan Timber Co., 103 Ala. 371, 379.

But if we are mistaken in this, it is fully shown that the *contracts involved in this suit* were not made by this agent, and that he had no part in the transactions culminating in this loan except to transmit the papers back and forth. It is insisted, therefore, that even if the association infringed the laws of Alabama by sending this soliciting agent into the State, and thereby made itself amenable to the penalties prescribed for violation of said laws, it did not on that account forfeit the right to enforce contracts which it made *in the State of Tennessee*, with citizens of Alabama. The utmost extent to which the Alabama Courts have gone in construing these laws is to hold that contracts made *in Alabama* by non-resident or foreign corporations, without compliance with the Alabama laws, are unenforceable.

IV.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals says in its opinion that "it is perfectly clear that all the business of loaning money to Denson, *with the single exception that the association in Tennessee said 'yes,'* was transacted in Alabama."

Record, p. 71.

Conceding that this view of the case is correct, it is respectfully submitted that it sustains our contention that the contract sued on was made in Tennessee, and therefore was not a doing of business in Alabama. For there was no contract until the association said "yes" to Denson's application; and *when* and *where* it said "yes," *then* and *there* was the contract made. We think the proposition is fully sustained by the authorities hereinbefore cited.

With all deference to the opinion of the learned Court of Ap-

peals, it is respectfully submitted that it has been misled to the conclusion that this contract is unenforceable by overlooking the point suggested in the next preceding paragraph of this brief, that it is immaterial, so far as this case is concerned, if the association was illegally doing business in Alabama when this loan was made, unless *the very contract here sued on* was made in that State. The State of Alabama has not undertaken to prohibit the enforcement by the association of its contracts lawfully made in the State of Tennessee, as a penalty for the illegal transaction by it of business in the State of Alabama; nor could it do so.

It is further submitted that the Court of Appeals is mistaken in the statement that the payment of the money loaned took place in Alabama. The undisputed evidence is that the association had no money in the State of Alabama at the time the check in favor of Denson, for the amount loaned him, was drawn; and that the money was paid by the Chattanooga bank on which it was drawn, out of funds on deposit therein belonging to the association.

Record, p. 21.

It is true the cashier of the Gadsden bank, by whom the check was cashed for Denson, says that his best recollection is that he paid the money on the check "under an understanding with the said building and loan association, and that the Chattanooga National Bank, on which the check was drawn, would pay the same on presentation." He further says that he "transmitted the check to our Chattanooga correspondent and the same was paid;" and that he paid the money to Denson on this check "as on any other negotiable exchange."

Record, p. 51.

But this evidence, instead of in any way contradicting, directly sustains and corroborates the contention that the association paid over the sum of money which it had agreed to lend Denson, in the State of Tennessee. The Gadsden bank, understanding from the association, or the Chattanooga bank, or both, that the check would be paid on presentation, was willing to, and did, take it and advance the money on it "as on any other negotiable exchange;" and the check was then forwarded to Chattanooga and paid to the person by whom it was presented, in accordance with the order of Denson, the original payee.

It is further submitted that the apprehension, expressed by the Court of Appeals, that this and other foreign corporations of the same kind "may safely flood the State of Alabama with soliciting agents, make all the negotiations for loans, take real estate securities therefor and fully transact all other business pertaining to their corporate functions as though incorporated therein" without complying with the requirements of the Alabama laws, should not be of controlling force in the determination of this case. The penalties imposed for violation of the laws in question are ample and stringent; and no reason is apparent why the courts should seek to add to the severity of the laws by reading into them additional penalties. But if the courts have power in their discretion to impose additional penalties to those prescribed by the statutes, it is submitted that the fact that the violation of the laws, if they have been violated, shown in the present case was not wanton or wilful,

but was due wholly to the ignorance on the part of the officers of the association of the laws of a foreign State, is a sufficient reason, especially in a court of equity, why that discretion should not be exercised.

V.

THE STATE OF ALABAMA HAD NO POWER TO PROHIBIT THE MAKING OF THE CONTRACT HERE INVOLVED, OR INTERFERE WITH ITS ENFORCEMENT.

There can be no question that the contract whereby Mr. Denson became a stockholder in the association was a Tennessee, and not an Alabama, transaction. The application for the stock was presented in Tennessee, acted on and granted in Tennessee; and the certificate of stock was issued in Tennessee, on its face is a Tennessee contract and is to be performed in that State.

Exhibit No. 3 to Denson's dep., Rec. p. 46.

It is true that the application of Mr. Denson for this stock was solicited by defendant's traveling agent in Alabama; but we think the case of *Beard v. The Union & American Pub. Co*, 71 Ala. 60, settles the proposition that the solicitation by this agent did not constitute a doing of business in Alabama by the association.

See also *Sullivan v. Sullivan Timber Co*, 103 Ala. 371, 379.

The State of Alabama has no right or power to forbid the making by its citizens of contracts outside the State and with citizens of other States; and we do not think it has assumed to do so.

"Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to *contract outside of the State* for insurance on his property" (or for the purchase of stock), "*a right of which the State legislation cannot deprive him?* We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the State statutes. * * * * * *

"When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case *where the contract was made outside the State and as such was a valid and proper contract.*

* * * * * * * * * * *

"The mere fact that a citizen may be within the limits of a particular State does not prevent his making *a contract outside its limits*, while he himself *remains within it.*"

Allgeyer v. Louisiana, 165 U. S. 578, 590, 591, 592.

Therefore Mr. Denson, a resident of Alabama, had a right to become a subscriber to stock in a Tennessee corporation, and the Tennessee corporation had a right to issue its stock to him; and such a transaction, carried on as this one was, was not a doing of business in Alabama, and the laws of Alabama could not prohibit it.

But having lawfully become a stockholder in the association, then Mr. Denson *became entitled to receive a loan* whenever there was money in the treasury, and he bid the highest premium for it.

For the petitioner is chartered and organized under the public statutes of Tennessee authorizing the creation of corporations for carrying on the business of building and loan associations, and the loan in controversy was made in accordance with the power conferred on petitioner by its charter, and in the manner prescribed by its by-laws.

Stipulation, Rec. p. 64.

The statutes under which petitioner was chartered and organized provide that the money in the treasury shall be offered for loan at stated meetings of the board of directors, and that "the stockholder who shall bid the highest premium for the preference or priority *shall be entitled* to receive a loan of two hundred dollars for each share held by such stockholder."

Shannon's Code of Tennessee, §§ 2136, 2151, 2177;
Tennessee Acts 1875, Ch. 142, § 14;
Tennessee Acts 1889, Ch. 267, § 1;
Tennessee Acts 1893, Ch. 12, § 1.

The bid of Mr. Denson was the highest that was offered for the sum of money which he desired, at the meeting at which his application was presented, and the security offered by him was satisfactory.

Record, p. 20.

He therefore became entitled, by virtue of his contract of membership, to obtain the loan; he acquired *a vested right* to it, which he could have enforced against the association by suit; and being a right which could have been enforced by suit, the association properly yielded to it without suit, and the State of Alabama had no power or right to interfere with the performance of such a contract.

In *Bedford v. Eastern B. & L. Asso.*, 181 U. S. 227, 241, this court says: "The building association was incorporated under the laws of New York to make loans to its members, and rights to a loan accrued to membership. The condition of a loan existing—means in the treasury, a tender of good security—the contingent right became a vested one, a contract was formed, and, can there be a doubt that it was enforcible against the association? If it could have been enforced by suit, it was properly yielded to without suit and possessed all legal sanctions."

While the power of the States to impose conditions upon foreign corporations doing business within their limits is recognized and undisputed, "manifestly it cannot be exercised to discharge the citizens of the State from their contract obligations."

181 U. S. 242.

VI.

THE FAILURE TO COMPLY WITH THE ALABAMA LAWS, UNDER THE CIRCUMSTANCES SHOWN HERE, WOULD NOT RENDER THE NOTE AND MORTGAGE UNENFORCEABLE.

If we are mistaken in all the other propositions we have stated, and if it be held that this loan did involve a doing of business in

Alabama by the petitioner, in violation of the laws of that State, and that the State had the right and power to forbid the transaction, yet the laws in question do not specifically declare that contracts made in Alabama by foreign corporations, without complying with the requirements prescribed, are void, or even unenforceable. It is true the Supreme Court of Alabama has held that a foreign corporation will not be permitted to enforce a contract made in that State without compliance with these laws; but it bases this holding on the ground that it is contrary to public policy to permit the enforcement in Alabama courts of contracts made in violation of Alabama laws.

"But the law does not allow this result for the benefit of either of the offending parties, as being less censurable or more favored than the other. It only lets the parties, *who are in equal fault*, severely alone, as the surest mode of securing obedience to the authority of its mandates."

Farrior v. New England Mortgage Security Co., 88 Ala. 275, 278–279.

And it was on this authority and on the same ground that the Circuit Court of Appeals directed the dismissal of this suit.

Record, p. 73.

In the present case, we submit that the parties are not "in equal fault." The petitioner paid to the State of Alabama the license fee which was required from foreign corporations doing business in the State, and then, supposing it had the right to exercise its corporate franchises in the State, proceeded to lend its money to this defendant. The defendant has no vested right in a defense of this kind; and as the courts have permitted such defense to prevail only because of the fault and wilful disobedience to the law of the moving party, it ought not to be allowed in a case where such fault and wilful disobedience are shown not to exist. The doctrine is a harsh one at best, and there is no reason why it should be extended especially in a court of equity. No principle of public policy would be contravened by requiring defendants to repay the money borrowed from petitioner, and permitting a foreclosure of their mortgage; and we submit that, aside from all other questions, the Circuit Court of Appeals, instead of extending the rule of forfeiture beyond the limits to which the Alabama courts had gone, should have held that inasmuch as the failure to comply with the laws in question was due to an innocent mistake of the officers of the association, neither the letter nor the spirit of the decisions of the Alabama courts required that petitioner should be repelled from court.

In a somewhat similar case, involving the question whether a forfeiture should be decreed of the rights of a Nebraska corporation to exercise its franchises in the State of Iowa, on account of an inadvertent omission on its part to comply with the conditions prescribed by the Iowa statutes, the Supreme Court of Iowa said:

"It is not expressly provided in its articles, or in the statute, that such violations amount to a forfeiture. If it was so provided, it would only remain for the Court to determine whether such violation had occurred, but, not being so expressly provided, the Court is vested with a discretion, and may refuse a judgment of

ouster, if in its opinion the interests of the public do not require such a judgment.

* * * * * * * * *

"We are convinced that a permit was not applied for under the belief that it was not required. * * * This was a mistaken belief, but if the corporations proceeded under that belief they did not act wilfully, or with any wrongful intent. * * * We are clearly of the opinion, upon the whole record, that, though the Nebraska corporation has heretofore unlawfully exercised its corporate powers in this State, yet there is no public interest demanding that it be unconditionally ousted from the exercise of said privileges and franchises."

State, ex rel. v. Ry. & Bridge Co., 91 Iowa, 517, 529, 532.

For the reasons stated, we respectfully submit that the decree of the Circuit Court of Appeals was erroneous and should be reversed.

ROBERT PRITCHARD,
J. B. SIZER,
Of Counsel for Petitioner.

No. 492. 206.

Office Supreme Court U. S.
FILED
DEC 21 1901
JAMES H. MCKENNEY,
Clerk.

Br. of Underwood for Resp't.
492

Filed Dec. 21. 1901.

In the

Supreme Court of the United States

Ex-Parte Chattanooga-National Building & Loan Association, *Petitioner.*

Petition for Certiorari.

BRIEF OF

O. W. UNDERWOOD and
W. H. DENSON

ATTORNEYS FOR RESPONDENTS

In the Supreme Court of the United States.

Ex-Parte Chattanooga National Building and Loan Association, *Petitioner.*	October Term, 1901.

The prayer of the petition should not be granted, nor should the certiorari be awarded.

There is no merit whatever in the petition. The case was elaborately argued before the Court of Appeals, and exhaustive arguments were presented in briefs. After mature consideration, the Court of Appeals pronounced its judgment in favor of the Appellants. After such judgment, petitioners here, filed a motion for a rehearing, and the Court denied the same.

All the points presented in the petition and in the brief of counsel in support of the petition, together with authorities cited, were presented to the Court of Appeals. Reference is made to these acts, to show the opinion of the Court was not made hurriedly or unadvisedly, but after mature reflection and consideration, and in view of the law, as now presented to this court, by counsel for the petition on their brief.

See case reported Denson vs. Chattanooga Nat. Building and Loan Association 107 Federal Rep. 777.

Attention of the Supreme Court is called to the fact, that the petition for certiorari is not as full and complete of the facts in the case, as the record of the case before the Court of Appeals.

From the allegations in the third paragraph of the petition, it appears that the petitioner had no place of business or resident agent in the State of Alabama on the 25th of May, 1895, and prior thereto, but it would seem from the statements therein, that the petitioner had such place and agent just after the 25th of May, 1895.

The note and mortgage were executed in Gadsden, Alabama, and delivered in Gadsden, Alabama, on the 10th of June, 1895, this being the TIME and PLACE and MODE in which the transaction was consummated, and not on that day, AND NOT UNTIL SOME MONTHS AFTER THE LOAN WAS MADE TO DENSON, and not until the 7th of October, 1895, did the petitioners obey the laws of Alabama prescribing the conditions under which foreign corporations may do business in that State.

See the facts set out in the opinion of the court in this case.

Denson vs. Chattanooga Nat'l. Bld. and Loan Assn., 107 Fed. Rep. 777, 778, 779.

See Record (printed transcript filed herein) page 59.

Again the petition fails to show, (see 4th paragraph) that the application for the stock and loan was made on the suggestion and at the solicitation of Kennedy, the traveling and soliciting agent of the petitioner, and that all of said applications and papers were made and executed by Denson in Gadsden, Alabama, and delivered by him to the said agent of petitioner in Gadsden, Alabama, and that said agent forwarded the same to petitioner at its home office, see:—Record pages 34, 36.

Denson vs. Chatt. Nat. B. and L. Ass'n. 107 Fed. Rep. 778.

It appears from the allegations of said paragraph, that the presence of Kennedy, the traveling and soliciting agent of petitioner, in Gadsden was a mere fugitive visit, a mere accidental presence in Gadsden, and with no intention to solicit business there, but the same was done at the solicitation of Denson and for his accommodation merely.

The truth is, at the time the negotiations were commenced with Denson, the petitioner had been for some time prior thereto "soliciting subscriptions to stock and receiving applications for loans in the State of Alabama." See

Denson case, 107 Fed. Rep. 779.
Record pp. 24, 25.

The 5th paragraph of the petition, and all other parts thereof, fail to show that the application for the loan "was accompanied by the report of two persons, selected by the petitioner, fixing the value of the property to be mortgaged at $8,000.00 and the certificate of an attorney, also selected by the petitioner, with reference to the condition of the title." See

Denson case 107, Fed. Rep. 778.
Record pages 42, 57, 58.

There is a want of fullness in the sixth paragraph of the petition as to the execution of the note and mortgage and their delivery, and also the delivery of the check and the payment of the money thereon by the Gadsden bank.

The truth is, the note and mortgage were prepared at the home office of petitioner, and forwarded to Kennedy, the said agent by whom the application had been taken, and forwarded to the home office. At the same time the check of petitioner, for the loan, on the Chattanooga National Bank of Chattanooga, Tenn., drawn in favor of Denson, was sent to D. P. Goodhue of Gadsden, Alabama, with instructions to him to deliver said check to Denson, when he should have executed and delivered the note and mortgage. Denson executed the note and mortgage and delivered the same to the petitioner's agent, at Gadsden, Alabama, and the agent delivered the check to Denson, directing him to present the same to the First National Bank at Gadsden which would pay the same.

The check was presented to said bank and the same was paid to Denson, the cashier paying the same "under an understanding with the said building and loan association, that the

Chattanooga National Bank, on which the check was drawn, would pay the same on presentation." See

Denson case, 107 Fed. Rep. 778, 779.
Record pages 44, 45, 51, 58, 59.

On an inspection of the evidence in the case it will be ascertained that the Court of Appeals was correct in saying that everything was done in Alabama by petitioner to consummate this loan to Denson with the single exception, that petitioner said "yes" in Tennessee.

To come within the condemnation of the law of Alabama, it is not necessary that the contract should have been concluded in Alabama. The laws of Alabama are prohibitory of foreign corporations DOING ANY BUSINESS IN THAT STATE.

If the said laws were prohibitory of MAKING ANY CONTRACT in Alabama by foreign corporation, then it would be necessary to show the contract was made in Alabama,—was an Alabama contract.

The Supreme Court of Alabama has defined what is meant by the constitution and statutes of that state in the use of the language "do any business in this State," the language of the constitution, and "engaging in or transacting any business in this State," language of the statute.

Such definition does not require a contract to be consummated in the State by a foreign corporation to bring into action the prohibition of the laws against foreign corporations doing, engaging in or transacting any business in the State.

The transaction of any business, or any part thereof, for the carrying on of which the corporation was created comes within the purview of the prohibitory laws. See.

Denson's case 107 Fed. Rep. 780 and authorities there cited.

It is held by the Supreme Court of Alabama, that the doing of the very acts, the very things, the proof shows were done in this case, are within the prohibition of the laws of the State. See.

Denson's case Supra and authorities cited.
State vs. Bank 108 Ala 3-6.
Farrior vs. New Eng. Mort. Co. 88 Ala 279.

If it was necessary to show that the contract was concluded in Alabama, then what was done in this case shows the contract was consummated and concluded in Alabama.

Equitable Life Ins. Co. vs. Clements 140 U. S. 226, 234.
New York Life Ins. Co. vs. Cravens 178 U. S. 389, 395.
Hart vs. Bray 50 Ala. 446.
Strong vs. Collins 35 Ala. 607, 611.
Hitchcock vs. U. S. Bank 7 Ala. 426-27-28-29.

The Alabama Supreme Court hold that section 4 article 14 of the constitution of that state is self executing, and did not require any legislative enactment to give it effect, that said provision is PROHIBITORY of any act of business in that state by a foreign corporation, unless BEFORE doing such act, the said provision has been complied with.

A transaction had, without the compliance with these laws is absolutely null and void, it transfers no title and creates no right or cause of action in the offending corporation.

Am. Un. Tel. Co. vs. Wes. Un. Tel. Co. 67 Ala. 26, 30 et seq.
Farrior vs. New England Co. 88 Ala. 275, 279.
New England Co. vs. Ingram 91 Ala. 337, 339,
Sullivan vs. Vernon 121 Ala. 393.
Dudley vs. Collier. 87 Ala. 431, 433, 435.
State vs. Bank 108 Ala. 3-6.
Smith vs. Ala. Life Ins. & Trust Co. 4 Ala. 558.
Smith vs. Kernochan 7 How. (U. S.) 198, 199.

The Supreme Court of Alabama hold that there need be no series of acts, but the doing of one such act, which is an exercise of any of the corporate functions for which the corporation was organized to engage in, is sufficient to condemn the transaction.

Farrior vs. New England Co. 88 Ala. 275, 278.
Dudley vs. Collier 87 Ala. 431.
Denson vs. Chatt. Nat. B. & L. Assn. 107 Fed. Rep. 777, 780, 781.

The record in this case shows there were a series of transactions had with other persons in the State of Alabama prior to 7th Oct., 1895, the time when petitioner complied with the laws.

See Record page 43.

The Supreme Court of Alabama hold these laws, prescribing the conditions under which foreign corporations may do business in Alabama, are police regulations.

Am. Un. Tel. Co. vs. Wes. Un. Tel. Co. 67 Ala. 26.
Dudley vs. Collier 87 Ala. 472.

Subsequent compliance with said Alabama laws cannot relate back and give validity to a contract or transaction which at the time it was made, was null and void.

Stephens vs. Smith 10 Wall. 321, 327.
Hall vs. Coxpell 7 Wall 542, 559.
Swan vs. Miller 82 Ala. 530, 540.
Pettit vs. Pettit 32 Ala 308.
15 Am. & Eng. Encyl. Law (2 Ed.) 936, 942.

Any conveyance or transfer of title made on a transaction forbidden by the constitution and statutes of the state is absolutely void and null, and divests no title, confers no right and creates no cause of action.

Stephens vs. Smith 10 Wall. 321.
Frederick vs. Gray 12 Kan. 518, 533.
Pettit vs. Pettit 32 Ala. 288, 289, 308.
Clark vs. Colbert 67 Ala. 92, 94, 95.
Smith vs. Kernochan 7 How. U. S. 198, 199.
Smith vs. Ala. Ins. Co. 4 Ala. 558.
Robertson vs. Hayes, 83 Ala., 290.
Swann vs. Miller, 82 Ala., 538, 540.
Thomas vs. West Jersey R. R., 101 U. S., 71, 87.
Tel. Co. vs. Yopst, 3 Law. Rep. Anntd, 224.
Jemison vs. Bmgham R. R. Co., 125 Ala.

The bill in this case is filed to enforce an unlawful and void contract and to recover under and through such illegal transaction. The alleged right and title to the relief asked rests upon a transaction null and void, because prohibited by the constitution and statutes of Alabama.

These laws were in force, and are now in force, in Alabama, when the petitioner entered into the transaction with Denson, and they informed petitioner that doing any business in Alabama, which involved the exercise of the functions or carrying into execution of any of the powers of the corporation for which it was created and organized to engage in and carry on, without first complying with the provisions of such laws was unlawful, and that the Supreme Court of Alabama condemned all transactions as null and void without obedience to these laws, and created no right or title and gave no cause of action, and that the same could not be enforced in the courts.

These provisions of the law were as much a part of the contract and as binding upon the petitioner, as if they had been written in the face of the contract.

Whatever their limitations were, upon the power of the petitioner to contract in Alabama, whatever their discriminations were, they became conditions of the right of the petitioner to do business in Alabama, and the consequences of the failure to conform to said laws were accepted by the petitioner.

Ignorance of the law is no excuse, as appears to be insisted on in this petition. The State prescribed the PURPOSES of a corporation and the MEANS OF EXECUTING THOSE PURPOSES. Purposes and means are within the State's control. This is true as to domestic corporations. IT HAS A BROADER APPLICATION TO FOREIGN CORPORATIONS.

What the Supreme Court of Alabama say the constitution and statutes of the State mean, the Federal Courts will accept, whether it is declared by limiting the object of their general language, or by separating their provisions into valid and invalid parts. The Federal Courts are bound by the interpretation given these laws by the Supreme Court of Alabama.

The interests of the State must be deemed to be expressed in its laws. The public policy of the State must be deemed to be authoritatively declared by its courts. Their evidence the

Federal Courts cannot oppose by views of their own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred, OR BE PERMITTED TO BE ENFORCED.

New York Life Ins. Co. vs. Cravens, 178 U. S., 389, 395, 397 to 401.

Water-Pierce Co. vs. Texas, 177 U. S., 28, 42 to 47.

Sullivan vs. Vernon, 121 Ala., 393, 396.

Because the note is made payable at Chattanooga and is dated there, and because the papers express that the transaction is entered into with reference to the laws of Tennessee, cannot defeat the operation of the constitution and statutes of Alabama bearing on this subject.

Authorities last above cited.

Equitable Life Ins. Co. vs. Clements, 140 U. S., 226 to 234.

If this case was tried in the Courts of Alabama, the transaction would be condemned as null and void and non-enforceable.

Farrior vs. New Eng. Co., 88 Ala., 275, 279. This case is on all fours with the case under consideration.

Sullivan vs. Vernon 121 Ala. 393.

State vs. Bank 108 Ala. 3-6.

The same rule of decision will prevail in the Federal Courts the question being one under the Constitution and statutes of a State and of State polity.

The petitioner is mistaken, that it is necessary to reverse the judgment in this case, to secure uniformity of decision in the Federal Courts. That purpose has no application in this case, it applies to cases of general jurisprudence, and where the Federal Constitution and statutes are involved. To reverse this judgment would be to create confusion, and to establish one rule in the Federal Courts and another in the State Courts as to the same question and that question too, being the interpretation of the Constitution and statutes of the State.

The positive rules controlling in such cases is that the State decisions furnish the paramount and binding rule of decision to the Federal Courts.

This case depends upon the meaning of the constitution and statutes of Alabama; the Supreme Court of that State, has given the construction and interpretation of those laws. The Federal Courts are precluded by such decisions and will adopt and follow them as the rule of decision in this case. The Federal Courts regard such decisions of the State Court, as a part of said laws and as binding upon them, and as conclusive, as the text of the constitution and statutes.

N. Y. Life Ins. Co. vs. Cravens, 178 U. S. 580, 586.
Louisiana vs. Pillbury 105 U. S. 294.
Leffingwell vs. Warren 2 Blach 599, 603,
Water-Pierce Co. vs. Texas, 177 U. S. 42, 47.
Erb vs. Morasch 177 U. S. 584.
Tullis vs. Lake Erie etc. 174 U. S. 348, 353.
M. K. & T. R. R. vs. McCann, 174 U. S. 580, 586.
Sioux City R. R. vs. N. A. Trust Co. 173 U. S. 99-107.
Morely vs. Lake Shore Co. 146 U. S. 162-166.
Aberdeen Bank vs. Chehalis Co. 166 U. S. 440.
Fallbrook vs. Bradley, 164 U. S. 112, 155.
Fairfield vs. Gallatin, 100 U. S. 52.

The petitioner by coming into the Federal Court, cannot secure greater or different relief than otherwise it would, if it had brought suit in the State Court.

If equity will not relieve a complainant in a State Court, neither will it relieve it in the Federal Court. The complainant can have only the same relief and no more, in the courts of the United States, that it can have in the State Courts.

Ewing vs. St. Louis, 5 Wall 413-419.
Iowa Railway Co. vs. Iowa, 160 U. S., 389, 393.
M. L. and Trust Co. vs. Krumsliz, 172 U. S. 351, 358, 359.

The authorities cited in petitioner's brief, are not in point in this case, and the points of contention in its brief, are outside the points involved in this case.

Probably it could be admitted that all the propositions of the brief are true, as abstract propositions, but they have no application to the case at bar. The Court of Appeals so held in its opinion in this case.

Denson's case, 107 Fed. Rep. 779.

The language of that court on said page eliminates from the decision of the case, under the laws of which state is the contract of loan to be construed, and in what place was the money loaned to be repaid· but the court bases its decision on the facts disclosed by the record, that the petitioner did business in Alabama in securing this loan, in contravention and violation of the laws of said state. On this point, the Court of Appeals uses this language: "On the facts as recited in the present case, it is perfectly clear that all the business of loaning the money to Denson, with the single exception that the Association in Tennessee said 'yes,' was transacted in the State of Alabama, and that the contract was completed by its execution and delivery of a note and deed of trust, and the payment of the money loaned, all in the State of Alabama; and the same was 'doing the business for which the Association was incorporated' within the meaning of the constitution and laws of the State of Alabama, as above quoted."

It is unnecessary to discuss or analyze the points and authorities presented by the brief of petitioner.

The authorities are inapplicable under the facts of the case, and the law of the case as announced by the Court of Appeals.

The Holder case 169 U. S. 81 cited by petitioner, is not an authority for its contention. The facts of that case, show the contract was made in Ohio. See pages 91 and 92 of that case. Under the facts in the case at bar, the contract was concluded in Alabama.

Equitable Life Ins. Co. vs. Clements 140 U. S. 226, 234.
New York Life Co. vs. Cravens 178 U. S. 389, 395.

The statute under consideration in the *Holder* case, expressly provides on its face, that "all *contracts* made in this state, Michigan, shall be void." Prohibition was on the making of

contracts and was not leveled against "engaging in or carrying on business" as in the Alabama laws.

This fact is overlooked by the petitioner, and was not involved in any of the cases cited by petitioner. A different state of facts, and different constitution and statutes are presented in the case, from that of any case cited on petitioner's brief.

The Allgeyer case 165 U. S. 578, has no application here. That case was on a different state of facts.

On page 583 of that case it is stated by the Court, that: "It is not claimed in this suit, that the Atlantic Mutual Insurance Company has violated this provision of the Constitution by doing business within the State." The facts are not only different but the principles of law are different, from the case at bar.

Unquestionably the *contract* in the Allgeyer case was made in New York, and all that was done in the State of Louisiana was the mailing of a letter of notification, which was done after the contract had been made in New York.

169 U. S. 586, 587, 588.

Attention is called to the fact that in the Allgeyer case, the case of Hooper vs. California, 155 U. S., 648, is distinguished from the Allgeyer case, and by the last case, no doubt was intended to be thrown upon, or in the least to shake the authority of the Hooper case.

In the Bedford case, 181 U. S., 227, the facts were different and a different statute was involved.

That case cannot be so distorted as to furnish any authority, or even persuasion, to reverse the judgment of the Court of Appeals.

It is not necessary to analyze the Bedford case—its purpose and principles are plain on the face of the case.

As stated in former part of this brief, the Supreme Court of Alabama construe and hold the Constitution and Statute under consideration as police regulations.

Am. Un. Tel. Co. vs. Wis. Un. Tel Co., 67 Ala., 26, 30.
Dudley vs. Collier, 87 Ala.. 432.

In this the Supreme Court was correct, as the State prescribes the purposes of a Corporation, and the means of executing those purposes. What is the meaning of the Constitution and Statutes of Alabama, what interest the State expresses in said laws, and what policy the State proposes to establish by them must be deemed to be authoritatively declared by its courts, and the Federal Courts will not oppose the same by views of their own.

New York Life Ins. Co. vs. Cravens 178 U. S. 389, 395 to 407.

These principles are recognized by the decision of the Court in the Bedford case *ante*.

In the Allgeyer case *ante* on page 579, 590 the Court say: "When or how far the police power of the State may be legitimately exercised with regard to such subjects must be left for determination in each case as it arises."

The opinion of Judge Hammond as reported in the Bedford case 88 Fed. Rep. 7, 10, 11, 13, 17 the distinction is there recognized between the Statute then under consideration, and that at bar.

In that opinion, page 17, the fact is recognized that the laws of Tennessee and those of Alabama as they relate to the matters under consideration, were enacted for an entirely different purpose, and to use a law like that of Alabama, to throw any light on the law of Tennessee, would be a perversion of the law of Alabama, and *vice versa*.

We don't understand that it is the office of a certiorari, under the statute that authorizes such writ in this case, that such writ will issue to review the finding and conclusion on the facts in this case, as made by the Court of Appeals.

If such was the law, then every case could be brought to the Supreme Court, determined by the Court of Appeals on its finding of facts, and for the purpose of getting a different finding and conclusion on the facts by the Supreme Court, from that made by the Court of Appeals. This would crowd the dockets of the Supreme Court with innumerable cases, and prevent that

relief to the dockets of the Supreme Court, that was the purpose to accomplish, by the creation of the Circuit Court of Appeals.

A CERTIORARI, at common law was a revisory remedy, intended only for the correction of errors of law apparent on the record, and was not a substitute for an appeal, nor allowed for the correction of errors of fact, which were properly revisable on appeal.

Dean vs. State 63 Ala. 153, 154.

It is not mandatory on the Supreme Court to grant this writ, but whether or not it shall issue, rests in the sound discretion of the court.

Unless the court can clearly see that an error of law has been committed, or that injustice will ensue unless the writ is issued, the same will be denied.

In view of the law, and the facts set forth in the record of the case as presented in Court of Appeals, the petition totally fails to present any grounds, or to offer any just reason why the writ should issue, and it is respectfully submitted that the same be not allowed.

Interest reipublicae ut sit finis litium.

O. W. Underwood.

2317

Supreme Court of the United States.

No. 206.—October, Term, 1902.

The Chattanooga National Building and Loan Association, Petitioner, *vs.* William H. Denson and Rosa E. Denson, Respondents.

Brief of Oscar W. Underwood and W. H. Denson.

STATEMENT OF THE CASE.

This case comes before this court on a writ of certiorari at the instance of the said Building and Loan Association, to the United States Circuit Court of Appeals, for the Fifth Judicial Circuit, to review a judgment of that court pronounced against the petitioner, and in favor of respondents here.

The point of contention is, the petitioner was a foreign corporation to the State of Alabama, chartered and organized under the statutes of Tennessee as a Building and Loan Association. The transaction as evidenced by the note and mortgage, the basis of the action, and the other evidence in the case, is that of a loan by a building and loan association.

In the ninth paragraph of their answer to the bill, the respondents insist, as a full and complete defense to the matter set forth in the bill, that the said cause of action grew out of the petitioners engaging in or transacting business in Alabama, it being a foreign corporation, without first complying with the conditions imposed by the laws of

Alabama upon foreign corporations to enable them to engage in or transact any business within the said State.

The Circuit Court of Appeals sustained this defense of the respondents, denied the relief prayed for in petitioner's bill and ordered the lower court to dismiss the same.

This is the only point of contention in this litigation and the only question this court is asked to review.

THE CONSTITUTION AND STATUTES OF ALABAMA APPLICABLE TO THIS CASE.

Article 14, Section 4 of the Constitution of Alabama, 1875, in operation at the time this transaction took place, reads as follows:

"No Foreign Corporation shall do any Business in this State Without Having at Least one Known Place of Business and an Authorized Agent or Agents Therein."

Section 232 of the present Constitution, 1901, of Alabama employs the identical and same language.

The Act of the Legislature approved 28th of February, 1887, (see session acts 1886–87, page 102) and which is now embraced in sections 1316, 1317, 1318, 1319 and 1320 of the Code of 1896 of Alabama, reads as follows:

"1316. Foreign Corporation must file Instrument of Writing Designating Agent and Place of Business in this State.—Every Corporation not Organized Under the Laws of this State shall, before Engaging in or Transacting any Business in this State, file an Instrument of writing, under the Seal of the Corporation and Signed Officially by the President and Secretary thereof, Designating at Least one Known Place of Business in this State and an Authorized Agent or Agents Residing Thereat; and when any such Corporation shall Abandon or Change its Place of Business as Designated in such Instrument, or shall Substitute Another Agent or Agents for the Agent or Agents Designated in such Instrument of Writing, such Corporation shall file a new Instrument of

WRITING AS HEREIN PROVIDED, BEFORE TRANSACTING ANY FURTHER BUSINESS IN THIS STATE."

"1317. WHERE FILED.—SUCH INSTRUMENT, WHEN FILED BY ANY CORPORATION ENGAGED IN ANY BUSINESS OF INSURANCE, MUST BE FILED IN THE OFFICE OF THE STATE AUDITOR, AND WHEN FILED BY A CORPORATION ENGAGED IN OTHER BUSINESS THAN THAT OF INSURANCE, MUST BE FILED IN THE OFFICE OF THE SECRETARY OF STATE."

1318. UNLAWFUL FOR FOREIGN CORPORATION TO TRANSACT BUSINESS IN THIS STATE BEFORE DECLARATION IS FILED; PENALTY.—IT IS UNLAWFUL FOR ANY CORPORATION TO ENGAGE IN OR TRANSACT ANY BUSINESS IN THIS STATE BEFORE FILING THE TWO WRITTEN INSTRUMENTS PROVIDED FOR IN THE TWO PRECEDING SECTIONS; AND ANY SUCH CORPORATION THAT ENGAGES IN OR TRANSACTS ANY BUSINESS IN THIS STATE WITHOUT COMPLYING WITH THE PROVISIONS OF THE TWO PRECEDING SECTIONS SHALL, FOR EACH OFFENSE, FORFEIT AND PAY TO THE STATE THE SUM OF ONE THOUSAND DOLLARS."

"1319. UNLAWFUL TO ACT AS AGENT OF FOREIGN CORPORATION BEFORE SUCH DECLARATION IS FILED; PENALTY.—IT IS UNLAWFUL FOR ANY PERSON TO ACT AS AGENT OR TRANSACT ANY BUSINESS, DIRECTLY OR INDIRECTLY, IN THIS STATE, FOR OR ON BEHALF OF ANY FOREIGN CORPORATION WHICH HAS NOT DESIGNATED A KNOWN PLACE OF BUSINESS IN THIS STATE AND AN AUTHORIZED AGENT OR AGENTS RESIDING THEREAT, AS REQUIRED IN THIS ARTICLE; AND ANY PERSON SO DOING SHALL, FOR EACH OFFENSE, FORFEIT AND PAY TO THE STATE THE SUM OF FIVE HUNDRED DOLLARS."

"1320. SOLICITOR MUST ENFORCE PENALTIES; COMMISSIONS.—EVERY PENALTY PROVIDED FOR IN THIS ARTICLE SHALL BE SUED FOR AND RECOVERED IN THE NAME OF THE STATE OF ALABAMA, BY THE SOLICITOR OF THE CIRCUIT OR COUNTY IN WHICH THE OFFENSE IS COMMITTED, MUST BE PAID BY THE SOLICITOR INTO THE STATE TREASURY FOR THE USE OF THE STATE, LESS TWENTY-FIVE PER CENT. TO BE RETAINED BY SUCH SOLICITOR FOR HIS SERVICES. THE ATTORNEY-GENERAL SHALL REPRESENT THE STATE IN SUCH ACTIONS

CARRIED TO THE SUPREME COURT, AND FOR HIS SERVICES THEREIN IS ENTITLED TO ONE-HALF THE COMMISSIONS HEREIN ALLOWED TO THE SOLICITOR."

ARGUMENT ON LAW AND FACTS.

The Supreme Court of Alabama has decided the laws under consideration are a legitimate exercise of the police power of the State, and are police regulations; that such laws are *prohibitory* to foreign corporations doing business in Alabama without first complying with the provisions of said laws.

Am. Un. Tel. Co. vs Wes. Un. Tel. Co. 67 Ala. 26 et seq.; Dudley vs. Collier et al 87 Ala. 431-432.

To constitute "engaging in or transacting any business in this State" within the meaning of said laws, the Supreme Court declare, "there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created."

Beard vs. U. & A. Pub. Co., 71 Ala., 60-62; Sullivan vs. Sullivan Timb. Co. 103 Ala. 371-380——State vs. Bank 108 Ala. 3-6; Farrior vs: Mortgage Co. 88 Ala. 275-279; Association vs. W. H. Denson, page 71 Transcript in this case.

The caption of the bill and the first paragraph thereof show the petitioner is a foreign corporation chartered and organized under the laws of Tennessee, and principal office at Chattanooga, "*and that it is authorized and empowered by its charter to lend its funds to its stockholders on such terms and conditions and in such manner and under such regulations as may be prescribed by its constitution and by-laws, such loans to be secured by real estate.*"

Transcript p. 7½

It is indisputable that the lending of its funds to its stockholders and securing the same by real estate is the doing of some of the works, and an exercise of some of the functions of the Association to do which it was created and organized.

No person could obtain a loan, and the Association had

no power to make a loan to any one unless he was a stockholder therein.

Becoming a stockholder was the foundation upon which the whole transaction rested, and without which there could be no loan, as the charter inhibited a loan to all persons except a stockholder.

It would be a solecism to say there is a corporation but it has no stockholders; and the very business, the functions, the works the Association was created and organized to do was to secure stockholders. It could not carry on its business only as it would secure a stockholder, and its whole business was with its stockholders and none others.

It is one of the works and functions of a corporation, particularly a building and loan Association, owing to its peculiar business, and the means and mode by which its business is secured and carried on, to appoint and have agents, a corporation can carry its business only through agents.

Where and how did the Association secure the subscription for the stock that was to make a person a stockholder in said Association?

Let the Association through its Secretary tell:

"*The loan to defendant Denson involved in this suit was negotiated by one F. H. Kennedy, of Fort Payne, Ala., who was a traveling soliciting agent for the complainant, and whose business it was to solicit subscriptions to stock and to submit applications for loans from complainant. The application of defendant Denson for stock in complainant Association was forwarded by said soliciting agent to the home office of complainant in Chattanooga, Tenn., and the stock was duly issued and returned to said agent to be by him delivered to defendant Denson.*"

Transcript p. 20.

On this point Denson testifies: "*All the negotiations were commenced and consummated in Gadsden, Alabama and nowhere else. He never had any interview or communication with the Association at any time or place, only such as he had with the agents of the Association in Gadsden,*

Alabama. The said agent came into Denson's office in Gadsden and represented himself to be the soliciting agent for the complainant in this case. He said he understood that Denson was desirous of borrowing money, who informed him such was his desire. He said the complainant would lend to Denson at six per cent. per annum, with seven years within which to pay it, with twice the value on a real estate mortgage to secure it, which real estate should be appraised by two disinterested persons to be selected by the Association. Denson accepted the terms. Said person then presented the original of exhibit A to this deposition."

NOTE.—Exhibit is exhibit 2 on page 45 of Transcript.

Denson signed and executed said original instrument (Exhibit A is exhibit 2 supra) *on 25th of April*, 1895. *Each of the original instruments were each signed, executed, acknowledged before an officer in Alabama and delivered to the said soliciting agent of the complainant Association by me in my office in Gadsden, Etowah County, Alabama. The land described and embraced in the said mortgage is situated in the city of Gadsden, Etowah County, Alabama."*

Transcript pp. 29, 30, 31, 32.

Certainly it was an exercise of the functions and doing some of the works for which the Association was created and organized to do, when it appointed this agent, whose business it was to solicit subscription to stock and submit applications for loans from said complainant.

He was authorized and empowered to do these things in Alabama. The said agent was a resident of Alabama. He did solicit the subscription for stock and the application for the loan in Alabama, and he did secure the same in Alabama, and the same were signed by Denson in Alabama and delivered by him to said agent in Alabama, and the same were forwarded to the home office in Chattanooga. When these instruments were delivered to the agent in Alabama, they were then and there delivered to the Association, as this was his business as shown by the evidence. He was the agent of the Association, and was not the agent

of Denson. It is true Denson was dealing in Alabama with the Association through its agent in Alabama.

The fact the agent had to forward the same to Chattanooga does not show the Association did not receive them in Alabama, and was not doing business in Alabama within the meaning of said laws of Alabama. When Denson delivered the papers in Alabama to said agent there had been done in Alabama an essential thing; there had transpired in Alabama an essential fact, which was necessary and essential for the Association to carry on the work, or some part thereof, and to exercise the functions for which the Association was created and organized. Denson could not become a stockholder unless he subscribed for stock; he could not procure a loan unless he made an application therefor. To accomplish this the Association had two sets of agents, an agent in Alabama to work up business and the home office in Chattanooga to conclude said business. The home office could not conclude or perfect business unless it had business to act on. It received such business from and through its agent in Alabama, appointed for such purpose. Denson did not deal with the Association in Tennessee; he dealt with it in Alabama, through its agent in Alabama. That agent sent the applications to his principal at Chattanooga, who issued the stock and returned it *to said agent to be by him delivered to said Denson in Alabama.* Here is an agent appointed to secure applications for stock in Alabama, and to receive the stock in Alabama issued on such applications and to deliver the same in Alabama to the applicants. This agent had all the authority in Alabama to solicit business in Alabama for the Association, as the Association could exercise in Tennessee. And this business, as we have before stated, is the essential of all business of the Association and without which it could do no business.

We have seen in the testimony of Johnson, "*that the loan in this case was negotiated by F. H. Kennedy of Ft. Payne, Ala. * * The original application and bid of said Denson for the loan in controversy in this case was also*

*forwarded to complainant's home-office by said Kennedy, and was submitted along with other applications to complainant's Board of Directors at a stated meeting of the same. * * Said application was granted and the loan was directed to be made. * * Thereupon the note and deed of trust filed as exhibits to complainant's original bill in this cause, were prepared at the home-office of complainant Association and forwarded to said Kennedy, through whom the application had been submitted. At the same time a check was sent by complainant Association, on the Chattanooga National Bank of Tennessee, in favor of defendant, W. H. Denson, for the sum of $2,367.50 to D. P. Goodhue, of Gadsden, Ala., with instructions to said Goodhue to deliver said check to defendant upon the execution and delivery of said note and deed of trust. Complainant at that time had no money on deposit in any bank in the city of Gadsden, or the State of Alabama, and said check was subsequently presented for payment at the Chattanooga National Bank in the city of Chattanooga, Tenn., and was paid by said bank out of funds on deposit therein belonging to complainant Association.*"

Transcript pp. 20, 21.

Denson testifies:

"*The note and mortgage were delivered in Gadsden by the said agent to Denson, who executed the same and delivered them in Gadsden to said agent, and upon said delivery of the same, the said agent delivered to Denson, in Gadsden, the said check for the amount of said loan.*"

Transcript pp. 29, 30, 31, 32.

"*When Denson delivered to said agent the note and mortgage, the agent in Denson's office in Gadsden, Alabama, delivered to Denson the check for the amount of the loan, and he told Denson, at the time, to present it to the First National Bank of Gadsden, and he would receive the money on it. Denson presented the check at the Gadsden bank and the cashier, W. G. Brockway, paid him the money on it.*"

Transcript pp. 33, 34, 38, 39, 40.

"*The said check was not sent by Denson, or by his au-*

thority, or for his use or benefit, to the Chattanooga bank, or any other bank, for collection. He had no interest whatever in the check after the money was paid him on it."

Transcript p. 39.

"Brockway, the cashier of the Gadsden bank, swears he paid the money on this check under an understanding with the association, that the said Chattanooga bank, on which it was drawn, would pay the same on presentation. After such payment by Brockway, he transmitted the check to his bank's correspondent at Chattanooga and the same was paid. The stamp "For Collection," was not placed on said check to indicate that it was to be collected from the Chattanooga bank on account of W. H. Denson; but the money was paid Denson as on any other negotiable exchange."

Transcript p. 51.

"The Association made three other separate and distinct loans in Gadsden to residents of that place, besides that made to Denson, and under the same terms and conditions, and in the same mode and manner, as that made to Denson, to-wit: One 16th of May, 1895; one 30th of May, 1895, and one 1st of June, 1895."

Transcript pp. 38.

The certificate of the Secretary of State for Alabama shows, at the time the loan to Denson was made, and the three others named, the Association had not complied with the laws of Alabama, hereinbefore mentioned, prescribing the conditions under which foreign corporations can engage in or transact any business in Alabama.

Transcript pp. 52.

The testimony shows the Association employed two persons, residents of Gadsden, to appraise the value of the real estate Denson mortgaged to the Association to secure the loan and their appraisement is upon the application for the loan. The Association also employed Goodhue & Sibert, attorneys at Gadsden, to examine and report on the

title to the real estate, which they did on 10th of May, 1895. Transcript pp. 50, 51.

The foregoing is all the evidence material to determine the case.

The testimony in the case shows, without dispute, that the Board of Directors of the complainant directed the loan to be made. Thereupon the note and mortgage, the basis of this litigation, were prepared at the home office and forwarded to the said Kennedy, "*through whom the application had been submitted.*" At the same time a check was sent to D. P. Goodhue, of Gadsden, Ala., "*with instructions to said Goodhue to deliver said check to said Denson upon the execution and delivery of said note and deed of trust.*"

In addition to this, the Association had made arrangements with the Gadsden bank to pay said check, and said bank did pay said check under said arrangements with the Association upon presentation of same by Denson; and said agent directed Denson to present said check at said bank and it would be paid,

Had Denson not executed and delivered said papers, the check would not have been delivered to him.

It is impossible to conceive what other acts or functions the Association could do to carry out and transact the business it was created and organized to do, to make this loan than was done by it in Alabama.

Such instructions to the agent in Alabama, accompanying the transmission of the papers to him, constituted said agent, *pro vice*, as fully the representative of the Association to act for it in Alabama, and to perfect and conclude said loan in Alabama as the home office in Chattanooga had the power to do, had Denson applied in Chattanooga in person and there executed and delivered the papers and there received from said office the said check on the Chattanooga bank.

The agent at Gadsden was clothed with authority to demand of Denson its execution and delivery of the papers to him in Gadsden and he was authorized to accept the de-

livery of said papers in Gadsden from Denson and to deliver the check to Denson and to inform him the Gadsden bank would pay the check on presentation.

The execution and delivery of the note and mortgage to the agent was to be and actually was, concurrent and simultaneous with the delivery of the check to Denson, one was the consideration for the other, and all this took place in Alabama. Denson could not execute the mortgage without calling into operation the laws of Alabama and an Alabama officer. The Association knew Denson could demand the cash upon the execution and delivery of the note and mortgage. He was not borrowing the Association's check or its credit. He was borrowing its cash, hence it made the arrangement with the Gadsden bank to cash the check over its counter in Gadsden when the same should be presented.

The seat of operations and the authority to make and conclude said loan was removed by express authority of the Association from Tennessee to Alabama, and the agent in Alabama was clothed with all the authority to make and perfect this loan in Alabama as the home office had power to make in Tennessee, it could have done no more to this end in Tennessee than it did in Alabama.

It never signified to Denson it would make the loan, only when the said agent presented said papers to Denson for him to execute and deliver to said agent in Gadsden.

The fact the note is dated "*Chattanooga*," when the evidence shows it was executed and delivered in Alabama, and the money, the consideration for said note, was paid Denson in Alabama, and the fact the note recites it is made "*payable at the home office in Chattanooga, Tennessee*," when the evidence shows every payment by Denson was made in Gadsden, Ala., to the agent there appointed by the Association to receive it, and the further recital in the note and mortgage that they are executed "*under and with reference to the laws of Tennessee*" are not sufficient, all combined, to defeat the policy of the Constitution and Statutes of Alabama prohibiting foreign corporations from doing business

in Alabama without a compliance of said laws. The following cases are directly in point:

New York Life Ins. Co. vs. Cravens, 178 U. S. 389, 395, 398, 399.
Equitable Life Ins. Co. vs. Clements, 140 U. S. 226 234.

The Alabama cases cited in the opinion of the Circuit Court of Appeals declare:

"*Under the Constitution and the Statute a single act of business done, without complying with the prescribed conditions, is a violation of both; there need not be a carrying on of business. The loan of money here and the taking here of notes and mortgage to secure repayment, the mortgage being on land situated in this State, is the doing of business here within both the Constitution and the Statutes. And the facts that the notes and mortgage are executed here, though they may be payable elsewhere, and the land embraced in this mortgage is situated here, are sufficient to show prima facie that the transaction involves the doing of business by the lender and mortgagee in the State of Alabama.*

State vs. Bristol Bank, 108 Ala. 6.
Farrier vs. New England Co., 88 Ala. 275, 278, 279.
Mullens vs. Am. Freehold & C. Co., 88 Ala. 280.
Sullivan vs. Sheehan, 89 Fed. Rep. 349.

The case at bar is much stronger to show a "*doing business*" in Alabama than any of the cases cited.

In order that the said laws of Alabama should be brought into operation, and nullify this transaction it is not necessary to show *a contract was concluded in Alabama, nor under the laws of which State is the contract of loan to be construed, nor in what place was the money loaned to be repaid.*

The prohibition embraces not only contracts, but includes all acts, etc., transactions the doing of which is the exercise of some of the functions or the doing of some of the works for which the corporation was created and organized.

If the acts done in Alabama in this case do not constitute a contract, yet such acts as were done in Alabama, were such acts as are essential to constitute any contract

of loan and make it binding, and without the doing of such acts no contract of loan can exist.

Not to repeat what has been herein said about the subscription to the stock and the application for the loan having occurred in Alabama, there is not a shadow of doubt but Denson was required to execute the note and mortgage in Alabama and on land in Alabama, deliver the same in Alabama to the agent, in Alabama, of the Association, who was appointed by the Association to do such things in Alabama. And the check for the loan was not to be delivered to Denson in Alabama, until he had executed and delivered the said instruments in Alabama to said agent of the Association in Alabama.

As the evidence shows, the Association arranged with the Alabama bank to cash the check in Alabama, which was done.

If the matters conclusively established by the evidence do not show a violation of the laws of Alabama involved in this litigation, it is impossible to conceive a state of circumstances that would amount to such violation.

As has been stated, to constitute a disregard of said laws, it is not necessary that the contract should have been concluded in Alabama.

The Supreme Court of Alabama has held invariably, that a failure to comply with the said laws, makes any transaction absolutely null and void, insufficient to convey any title or create any cause or right of action, and makes such contract unenforceable.

Sullivan vs. Fernon, 121 Ala. 393–395.

Farrier vs. New England & C. Co., 88 Ala. 275, 277, 278, 379.

State vs. Bank & Co., 108 Ala. 3–6.

Am. Un. Tel. Co. vs. Wes. Un. Tel. Co., 67 Ala. 26–30.

Smith vs. Ala. Life I. & T. Co., 4 Ala. 558.

Smith vs. Kernochan, 7 How (U. S.) 198–199.

Any conveyance or transfer of titles made on a transaction forbidden by the constitution and statutes of the

State is absolutely null and void, divests no title, confers no right, and creates no cause of action.

Stephens vs. Smith, 10 Wall (U. S.) 321.
Smith vs. Kernochan, 7 How (U. S.) 198, 199.
Thomas vs. West Jersey R. R. Co., 101 (U. S.) 71-87.
Frederick vs. Gray, 12 Kan. 518, 533.
Pettit vs. Pettit, 32 Ala. 288, 289, 308.
Swann vs. Miller, 82 Ala. 538, 540.
Clark vs. Colbert, 67 Ala. 92, 94, 95.
Robertson vs. Hayes, 83 Ala. 290.
Jemison vs. Birmingham R. R. Co. 125 Ala.

Subsequent compliance with the laws cannot relate back and give validity to a contract or transaction which at the time it was made, was null and void.

Stephens vs. Smith, 10 Wall 321-327.
Hall vs. Coxpell, 7 Wall 542-559.
Swann vs. Miller, 83 Ala. 530-540.
Pettit vs. Pettit, 32 Ala. 308.
15 Am. and Eng. Encyp. Law, (2nd Ed.) 936-942.

UNITED STATES COURTS WILL FOLLOW RULINGS OF THE STATE COURTS.

No Federal question is involved in this contention. The rights of the parties grow out of the Constitution and Statutes of Alabama. In such case the United States Courts will be governed by and will follow the rulings of the Supreme Court of Alabama, as to the construction, interpretation and application of its own laws to any given state of facts.

Such State decisions are binding on the Federal Courts and preclude them from giving a different construction, interpretation and application of said laws, although as an independent proposition the Federal Courts might differ with the State Court. The Federal Courts will construe and apply such laws as settled by the Supreme Court of the State.

The exposition given by the highest tribunals of the

State to its own Constitution and Statutes, constitute a part of the law as much as if embodied in it, and is as binding upon the Courts of the United States as the text and is conclusive on such courts.

New York Life Ins. Co. vs. Cravens, 178 U. S. 389, 395–398.

Louisiana vs. Pillsbury, 105 U. S. 294.

Leffingwell vs. Warren, 2 Black 599–603.

Erb vs. Morasch, 177 U. S. 584.

Sioux City R. R. vs. N. A. Trust Co., 173 U. S. 99, 107.

Morely vs. Lake Shore Co., 146 U. S. 162–166.

M. K. & T. R. R. vs. McCann, 174 U. S. 580–586.

If this case was tried in the State Courts of Alabama, the transaction would be condemned as null and void and unenforceable.

Farrier vs. New England Co., 88 Ala.

State vs. Bank, 108 Ala. 3–6.

Sullivan vs. Vernon, 121 Ala. 393.

The Association cannot, by coming into the Federal Court, deprive the respondent of having the case determined according to the interpretation and application given the Constitution and laws of Alabama by its own Supreme Court; with the policy of the State Legislature, the Federal Courts have nothing to do, such interpretation and construction by the Supreme Court of the State furnish the rule of decision to the Federal Courts. If equity will not relieve a complainant in the State Court, neither will it relieve it in the Federal Court.

The complainant can have only the same relief and no more, in the Courts of the United States than it could have in the State Courts.

M. L. & Trust Co. vs. Krumseiz, 172 U. S. 351, 358–359.

Iowa Ry. Co. vs. Iowa, 160 U. S. 389, 393.

Ewing vs. St. Louis, 5 Wall 413–419.

TRANSACTION UNENFORCEABLE.

The offending corporation is the actor in this litigation.

It has invoked the jurisdiction of the Court to grant it relief, and enforce this unlawful contract, made in positive violation of the Constitution and Statutes of Alabama. No court, Federal or State, sitting in Alabama will enforce such a contract.

Cooper Mfg Co. vs. Fergerson, 113 U. S. 727–737.
Gibbs vs. Gas Co., 130 U. S. 396–412.
Farrier vs. New England Co., 88 Ala. 275–279.
Dudley vs. Collier, 87 Ala. 434–435.
Lycoming Co. vs. Wright, 55 Vt. 526–534.
Clark vs. Colbert, 67 Ala. 92.
Jemison vs. R. R. Co., 125 Ala. 378, 382.
Thorne vs. Ins. Co., 21 Am. Rep. 92.
15 Am. & Eng. Encyc. Law (2nd Ed.) 997–1001.

Where the only road to recovery is by way of an illegal contract, the court will not assist the parties to the contract in traveling it. The law will not allow a right to spring from its own deliberate violation.

Tel Co vs Yopst, 3 L R A 224.
Jemison vs R R, 125 Ala 378, 383.
Mooz vs Hannon, 93 Ala 503.

There has been a purpose in some jurisdictions to limit this doctrine and apply it only in cases of *malum in se* and not to those *malum prohibitum*, but such distinction has long since been disregarded, and does not prevail in the Alabama or United States Courts.

Gibbs vs Gas Co, 130 U S 396–412.
Evans vs City of Trenton, 24 N J Law 770–771.
15 Am & Eng Encyc Law (2nd Ed) 939.
2 Bouvier's Law Dictionary, latest edition by Rawle.

PETITIONER'S CONTENTION.

The contention of the Association is, that the transaction under consideration was a contract entered into and concluded by Denson with the Association in Tennessee, and therefore the inhibitory laws of Alabama, heretofore set out in this argument, do not apply.

This contention is untenable, as it is shown in a former part of this brief the said laws of Alabama are not limited alone to the making of contracts in that State by foreign corporations, but the inhibition of said laws embrace all acts of engaging in or transacting business as defined by the Supreme Court of Alabama in their interpretation and application of said laws.

It is useless then to cite decisions from other State Supreme Courts, or from any Federal Court, pronounced on such laws, that may prevail in such jurisdiction. The decisions of Alabama Supreme Court interpreting and applying these laws to a given state of facts, are as binding on the Federal Courts, as though such interpretation and application were written in the body of such laws.

AUTHORITIES ANTE.

What acts constitute the "*engaging in or transactiug any business*" within the meaning of said laws, and what acts or transactions constitute a violation of them must be finally determined by the Supreme Court of Alabama. So binding is this doctrine and so sedulously does the United States Supreme Court guard and observe it, that they declare, "WHEN A STATUTE OF TWO STATES, EXPRESSED IN THE SAME TERMS, IF DIFFERENTLY CONSTRUED BY THEIR HIGHEST COURTS, THEY ARE TREATED BY US AS DIFFERENT LAWS, EACH EMBODYING THE PARTICULAR CONSTRUCTION OF ITS OWN STATE, AND ENFORCED IN ACCORDANCE WITH IT IN ALL CASES ARISING UNDER IT. THE RULE OF CONSTRUCTION ADOPTED BY THE HIGHEST COURT OF THE STATE CONSTRUING ITS OWN CONSTITUTION AND ONE OF THEIR OWN STATUTES IN A CASE NOT INVOLVING ANY QUESTION RE-EXAMINABLE IN THIS COURT MUST BE REGARDED AS CONCLUSIVE ON THIS COURT."

Louisiana vs. Pillsbury, 105 U. S. 204.

Provident Inst. of Boston vs. Massachusetts, 6 Wall 611, 630.

Fairfield vs. Gallatin, 100 U. S. 47.

Bauserman vs. Blunt, 147 U. S. 647, 661.

New York Life Ins. Co. vs. Cravens, 178 U. S. 389, 395 to 401.

How the Supreme Court of Alabama have interpreted and applied these laws is set forth in the following cases.

State vs. Bristol Bank, 108 Ala. 3, 6.

Farrior vs. New England Co. 88 Ala. 265, 278, 279.

Mullens vs. American Freehold & C. Co. 88 Ala. 280.

Denson vs. Chatt. Nat. B. & L. Ass'n, pp. 71, 72, 73 of the Transcript in this case.

There is no point in this case "*re-examinable*" in the United States Supreme Court, only so far as to ascertain if the decision of the Circuit Court of Appeals properly applied the decisions of the Supreme Court of Alabama.

The decisions of the Supreme Court of Alabama last above cited decide every question involved in this litigation favorable to the respondents here.

The United States Supreme Court by using the word, "*re examinable*," refer to rights arising under the Constitution and laws of the United States, and matters of general jurisprudence.

It is not profitable or available to petitioner to cite decisions of any court, State or Federal, as to the correct meaning and application of the Constitution and statutes of Alabama when the Supreme Court of that state have construed and applied such laws.

It is not necessary to analyze and discuss the decision of Judge Hammond in the case of Bedford, cited from 89 Fed. Reporter, as the whole record was carried to the United States Supreme Court and there reviewed, and that decision is cited by the petitioner here as the principal ground to reverse the decision of the Circuit Court of Appeals pronounced in this case. That case is reported as Bedford vs. Eastern B. & L. Ass'n. 181 U. S. 227.

That case affords no support to the petitioner's contention in this case. The transactions as set forth in that case upon which the court passed, were *antecedent* to the statute of Tennessee; in the case at bar the transaction was *subsequent* to the Constitution and statute of Alabama.

In the Tennessee case the *subsequent* statute violated

and impaired the obligations arising from an *antecedent* transaction, while in the case at bar, the *subsequent* transaction was in contravention and positive violation of an *antecedent* Constitution and statute of Alabama. In other words, in the Tennessee case, the statute violated the contract, while in the case at bar, the transaction violated the Constitution and statute.

The facts set forth in the first headnote of the Bedford case 181 U. S. 227, present a different question, and the facts are different from those under consideration. Before the 26th of March 1891, the day the prohibitory laws of Tennessee were enacted, Bedford had become a stockholder in the New York Association, and had made application on the 20th of March 1891, for a preference for an advance; to which he was entitled, and the advance or loan was granted subsequent to the 26th of March 1891.

It was conceded the business of the Association in Tennessee had been lawful down to the 26th of March 1891, when the prohibitory statute was passed.

The Supreme Court held, "*that Bedford's subscription to the stock of the Association, its issuance, and the application of a loan* in pursuance of it, constituted a contract, which is inviolable by the state legislature."

In the case at bar, the Constitution and statue of Alabama had been in operation for many years prior to the transaction with Denson.

They informed petitioner that doing any business in Alabama, which involved the exercise of the functions or carrying into execution of any of the powers of the corporation for which it was created and organized to engage in and carry on, without first complying with the provisions of such laws was unlawful, and that the Supreme Court of Alabama condemned all transactions as null and void without obedience to these laws, and created no right or title and gave no cause of action, and that the same could not be enforced in the courts.

These provisions of the law were as much a part of

the contract and as binding upon the petitioner, as if they had been written in the face of the contract.

Whatever their limitations were, upon the power of the petitioner to contract in Alabama, whatever their discriminations were, they became conditions of the right of the petitioner to do business in Alabama, and the consequences of the failure to conform to said laws were accepted by the petitioner.

Ignorance of the law is no excuse, as appears to be insisted on in this petition. The State prescribed the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has a broader application to foreign corporations.

What the Supreme Court of Alabama say the Constitution and statutes of the State mean, the Federal Courts will accept, whether it is declared by limiting the object of their general language, or by separating their provisions into valid and invalid parts. The Federal Courts are bound by the interpretation given these laws by the Supreme Court of Alabama.

The interests of the State must be deemed to be expressed in its laws. The public policy of the State must be deemed to be authoritatively declared by its courts. Their evidence the Federal Courts cannot oppose by views of their own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred, or be permitted to be enforced.

New York Life Ins. Co. vs. Cravens, 178 U. S. 389, 395, 397 to 401.

Walters-Pierce Co. vs. Texas, 177 U. S. 28, 42 to 47.

Sullivan vs. Vernon, 121 Ala. 393, 396.

The court in the Bedford case never determined what would have been the effect on the ruling in the case, had the statute in that case been in operation before and at the time when the transaction was commenced and concluded.

That case does not determine what acts amount to engaging in or transacting any business in Alabama under

the Constitution and Statutes of that State. The Bedford case rules the subscription to the stock, the issuance thereof, and the application for a loan, constituted a contract. We have shown in a former part of this brief, that the circumstances under which the subscription to the stock, and the application for the loan, were procured, and the circumstances under which the note and mortgage were executed and delivered, the condition under which the check was to be delivered to Denson, and the circumstances under which the check was paid by the Gadsden bank, constitute the engaging in or transacting business within the purview of the Constitution and Statutes of Alabama, as interpreted and applied by the Supreme Court of Alabama.

State vs Bank, 108 Ala 3--6, and authorities there cited.

While it is not necessary to maintain the defense in this case to show the transaction is an Alabama contract, yet we insist that the transaction first assumed a binding obligation in Alabama, and therefore the contract was made in Alabama. The identical question has been determined in Alabama, in a case disclosing facts like those in this case, and the transaction held an Alabama contract.

Lindsey vs U S Sav & Loan Assn, 120 Ala 165.
Am Freehold Nal Co vs Sewell, 92 Ala 170--71.
3 Am & Eng Encyc Law (1st Ed) 547.

In the case of Equitable Life Ins. Co. vs. Clements, 140 U. S. 226--234, the court says:

"Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri, and consequently that the policy is a Missouri contract, and granted by the laws of Missouri."

The petitioner makes two radical mistakes in its contention:

First, It insists that the laws of Alabama are not infracted unless a contract was made in Alabama.

Second, Its argument and law insisted on, are pred-

icated on the conclusions it draws from the evidence, and not on the facts themselves.

Hence none of the cases cited to support its contention are applicable to the case disclosed by the evidence.

From my reading of page 242 of the Bedford case, 181 U. S., the conclusion is fixed in my mind, that the court, *in that case*, considered the contract as made in Tennessee, and under such ruling this court will hold the contract in the case at bar as made in Alabama.

It is not conceded that it is necessary the contract should have been concluded in Alabama to condemn the transaction, and the argument here made is only in reply to that of petitioner.

The Holder case 169 U. S. 81 cited by petitioner, is not an authority for its contention. The facts of that case, show the contract was made in Ohio. See pages 91 and 92 of that case. Under the facts in the case at bar, the contract was concluded in Alabama.

Equitable Life Ins Co vs Clements 140 U S 226, 234.
New York Life Co vs Cravens 178 U S 389 395.

The statute under consideration in the Holder case, expressly provides on its face, that "all contracts made in this state, Michigan, shall be void." Prohibition was on the making of contracts, and was not leveled against "engaging in or carrying on business" as in the Alabama laws.

This fact was overlooked by the petitioner, and was not involved in any of the cases cited by petitioner. A different state of facts, and different constitution and statutes are presented in the case, from that of any case cited on petitioner's brief.

The Allgeyer case 165 U. S. 578, has no application here. That case was on a different state of facts.

On page 583 of that case it is stated by the Court, that: "It is not claimed in this suit, that the Atlantic Mutual Insurance Company has violated this provision of the Constitution by doing business in the State." The facts are not only different but the principles of law are different, from the case at bar.

Unquestionably the *contract* in the Allgeyer case was made in New York, and all that was done in the State of Louisiana was the mailing of a letter of notification, which was done after the contract had been made in New York.

The case of Sullivan vs. Sheehan 89 Fed. Rep. 247, cited by petitioner, is a strong case for respondents here.

The whole transaction took place in Chicago, and not in Minnesota. All the negotiations were had there, and all the papers were executed and delivered there. Pages 249--250 of that case.

That case on page 249, holds, "Without complying with those conditions, such foreign corporation would not have the right, by its officers or agents, to come into this State, (Minn.) and there solicit subscriptions for its stock or solicit loans."

The petitioner did this very thing in Alabama, and hence the transaction is void, and the rulings of the Supreme Court of Alabama are sustained by the Sheehan case. The Bedford case 181 U. S. 227, holds that the doing of such acts in a State constitute a contract. Guarantee Say. L. & I. Co. vs. Alexander 96 Fed. Rep. 870, on the facts therein stated has nothing to do with the case at bar.

Respectfully submitted,

O. W. UNDERWOOD,

W. H. DENSON,

Attorneys for Respondents.

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Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 206.

THE CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, PETITIONER,

vs.

WILLIAM H. DENSON AND ROSA E. DENSON.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

OSCAR W. UNDERWOOD,
WILLIAM H. DENSON,
Counsel for Respondents.

(18,345.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 5376

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SUPPLEMENTAL BRIEF OF OSCAR W. UNDERWOOD AND W. H. DENSON, COUNSEL FOR THE RESPONDENTS.

Without receding in any manner from the position taken in our former brief, that this whole contention is controlled by the decisions of the supreme court of Alabama as to the meaning and application of the constitution and statutes of that State, and that such decisions are conclusive upon the courts of the United States, and that the Federal courts will follow them, however the said courts may entertain as an independent opinion that the State courts may be in error as to the interpretation and application of such laws, we cite the following principles and authorities from other States

sustaining the position of the Alabama courts on the question under consideration:

It will be observed, the decisions cited from other States were pronounced on statutes similar to those of Alabama. Non-compliance with such laws of a State by a foreign corporation makes null, void, and non-enforceable all transactions and engagements entered into and business done in such State by such offending foreign corporation.

Heuni *vs.* Fidelity Bldng. and Loan Ass'n, 87 Am. St. Rep., 519, 520.

Com. Mut. Fire Ins. Co. *vs.* Hayden, 83 Am. St. Rep., 545, 546, 547.

Swing *vs.* Munson, 71 Am. St. Rep., 772, 774, 775, 776.

The offending corporation cannot defeat the operation and effect of such laws and give validity to the transaction by the parties stipulating that their contract shall be construed in reference to the laws of another State.

Heuni *vs.* Fidelity Bldng. & Loan Ass'n, 87 Am. St. Rep., 519, 520, 521.

Com. Mut. Fire Ins. Co. *vs.* Hayden, 83 Am. St. Rep., 545, 546.

The transaction in the case at bar was unquestionably "doing business" in Alabama, and was a flagrant violation of the constitution and statutes of that State.

In such case the transaction cannot be enforced by any court sitting in Alabama.

It is not a question whether the contract was entered into and consummated in Tennessee, and it was a binding and lawful undertaking under the laws of Tennessee and could

be enforced under the laws of any State, upon the principle that a contract valid under the laws of the jurisdiction where made is valid and enforceable anywhere; but the question here is whether any court sitting in Alabama will enforce a contract plainly, squarely, and admitted to be in violation of the laws and public policy of Alabama, it makes no difference where the contract was made.

This last proposition is an exception to the general principle that a contract valid under the laws of the jurisdiction where made is valid everywhere and will be enforced. This rule depends upon a principle of comity; but no State or nation will enforce any contract in its own courts, no difference wherever it may be made, that is in disregard or violation of the public policy or positive legislation of such State.

Gist *vs.* West. Un. Tel. Co., 55 Am. St. Rep., 763, 770, 771, and note, page 774.

Swing *vs.* Munson, 71 Am. St. Rep., 772, 776.

Seamans *vs.* Temple Co., 55 Am. St. Rep., 457, 460.

Cowan *vs.* London Assn. Corp., 55 Am. St. Rep., 535.

Rose *vs.* Kimberly, 46 Am. St. Rep., 855, 856.

It may be insisted that the United States courts are not domestic courts and the enforcement of the transaction in this case is not an enforcement by the State courts of Alabama, and therefore the exception does not apply. It is true the Federal courts are not domestic courts of the State in which they exist and exercise their jurisdiction, but there can be no controversy as to their NOT BEING FOREIGN COURTS.

These courts exist in Alabama, and in innumerable instances they sit to enforce the laws of Alabama.

The United States are in no sense a foreign government to the State of Alabama.

The Supreme Court of the United States have decided that no court sitting in Alabama will enforce such a contract.

113 U. S. Rep.

The following cited cases are very like, in some of their facts, the case at bar, showing that what was done by the Chattanooga corporation in Alabama was "doing business" in Alabama and a violation of the laws of Alabama:

Swing *vs.* Munson, 71 Am. St. Rep., 772.

Heuni *vs.* Fidelity Bldng., &c., Assn., 87 Am. St. Rep., 519–521.

Seamans *vs.* Temple Co., 55 Am. St. Rep., 457.

Cowan *vs.* London Assn. Corp., 55 Am. St. Rep., 536.

In addition to the authorities cited on former brief, showing the laws under consideration are *police regulations*, we cite the following:

Com. *vs.* Vrooman, 44 Am. St. Rep., 603.

Heuni *vs.* Fidelity Bldng., &c., Ass'n, 87 Am. St. Rep., 519.

Com. Mutual Fire Ins. Co. *vs.* Hayden, 83 Am. St. Rep., 546.

Swing *vs.* Munson, 71 Am. St. Rep., 772, 776, *et seq.*

Powell *vs.* Pennsylvania, 127 U. S., 678–699.

OSCAR W. UNDERWOOD,
W. H. DENSON,
Counsel for Respondents.

Supreme Court of the United States.

No. 206.—October Term, 1902.

The Chattanooga National Building and Loan Association, Petitioner, *vs.* William H. Denson and Rosa E. Denson. } On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 27, 1903.]

Suit to foreclose a mortgage given by the respondents to the petitioner to secure a note for the sum of $5,000, given as evidence of a loan made by petitioner to respondents. The petitioner is a building and loan association, and a corporation of the State of Tennessee; the respondents are citizens of Alabama. One of the defenses of respondents is that the transactions were illegal because petitioner had not complied with the laws of Alabama in regard to foreign corporations doing business in the State. This is the only defense with which we are concerned. The Circuit Court rendered a decree foreclosing the mortgage, which was reversed by the Circuit Court of Appeals, and the bill was directed to be dismissed. (107 Fed. Rep. 777.) The case was then brought here by certiorari.

The constitution of the State of Alabama provides as follows:

"4. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this State." (Const. Ala. Art. XIV.)

The material parts of the code of the State passed in execution of the constitution are as follows:

"1316. Foreign corporations must file instrument of writing designating agent and place of business in this State.—Every corporation not organized under the laws of this State shall, before engaging in or transacting any business in this State, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this State and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this State." (Code Ala. 1896.)

"1318. Unlawful for foreign corporations to transact business in this State before declaration filed; penalty.—It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this State without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the State the sum of one thousand dollars." (Ib.)

"1319. Unlawful to act as agent of foreign corporation before such declaration is filed; penalty.—It is unlawful for any person to act as agent to transact any business, directly or indirectly, in this State, for or on behalf of any foreign corporation which has not designated a known place of business in this State and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to the State the sum of five hundred dollars." (Ib.)

There was no point made on the by-laws of the association, and by agreement they were omitted from the record on appeal to the Circuit Court of Appeals and are also omitted here. And it was also stipulated "that the complainant is a corporation chartered and organized under and in accordance with the public statutes of the State of Tennessee, authorizing the creation of corporations for carrying on the business of building and loan associations; that its principal office and place of business is, and was at the time the loan involved in this case was made, and has ever since continuously been, in the city of Chattanooga, State of Tennessee; and that the loan to defendant, William H. Denson, involved in this case was made in accordance with the power and authority conferred on complainant by its charter, and in the manner prescribed by its by-laws."

The note executed by respondents was as follows:

"$5,000.00. CHATTANOOGA, TENNESSEE, *June 10th*, 1895.

"On or before nine years from date I promise to pay the Chattanooga National Building and Loan Association, at its home office, Chattanooga, Tennessee, five thousand dollars with interest on the sum of twenty-five hundred dollars, at the rate of six per cent per annum, payable monthly.

* * * * * *

"It is further understood that this note is made with reference to and under the laws of the State of Tennessee, and if paid before seven years from this date such rebate from the premium included herein will be allowed as the board of directors of said association shall deem equitable."

The omitted part recited that the note was for money borrowed on fifty shares of stock, and expressed certain conditions of the non-payment of the note when due, or the non-payment of premiums or assessments; and also expressed the right of petitioner in case of such non-payments to collect the debt though not due and to foreclose the mortgage. The mortgage covered lots in the city of Gadsden, Elowah County, State of Alabama.

It repeated the note and its conditions and contained others. The facts connected with the execution of the note and mortgage are stated by the Circuit Court of Appeals as follows:

"The complainant below, The Chattanooga National Building and Loan Association, is, and was at the time the loan to Mr. Denson was made, a corporation under the laws of the State of Tennessee, with its principal office in the city of Chattanooga in that State. Among its corporate functions was the authorization, and, so far as we are advised, its sole business was to loan its funds to its stockholders on real estate security. It had no local office or agent in Alabama, but it had a traveling agent whose business it was to solicit subscriptions to its stock and to obtain applications for loans and submit the same to the home office of the association at Chattanooga.

"On the 25th of April, 1895, appellant Denson, who was a resident of Gadsden, Alabama, on the suggestion and at the solicitation of the agent, signed at that place a written application for fifty shares of stock in the association, complainant below, appellee in this court. This application was forwarded by the agent, to whom Mr. Denson delivered it, to the home office, where the stock was issued and returned to the agent to be by him delivered to Mr. Denson. On the same day on which he applied for his stock Mr. Denson signed a written application to the association for a loan of $2,500 on fifty shares of stock he had applied for. He offered a premium of $2,500 for the loan, and proposed to secure the loan and premium, if his application should be granted, by a mortgage on certain real estate in Gadsden, Alabama, which he represented to be of the value, in all, of about $9,000. This application was accompanied by the report of two parties selected by the association fixing the value of the property which Denson proposed to mortgage at $8,000, and the certificate of an attorney, also selected by the association, with reference to the condition of the title. This application was forwarded by the agent to the home office in Chattanooga, where it was submitted along with other applications to the board of directors, by whom the application was granted and the loan directed to be made in accordance with the charter and by-laws of the association. Thereupon a note and deed of trust were prepared at the home office and sent to the agent by whom Mr. Denson's application had been taken and forwarded; and at the same time the check of the association on the Chattanooga National Bank of Chattanooga, Tennessee, in favor of W. H. Denson for the sum of $2,367.50 was sent to one D. P. Goodhue of Gadsden, with instructions to him to deliver said check to Mr. Denson when he should have executed and delivered the note and deed of trust. Upon the execution of the note and deed of trust by Denson and wife and the delivery of the same to the agent, all at Gadsden, Alabama, the agent delivered to Denson the check for $2,367.50, directing him to present the same to the First National Bank of Gadsden, which would pay the same. The check was presented to the said bank and the face thereof paid over to Denson, as the cashier said, 'under an understanding with the said Building and Loan Association and that the Chattanooga National Bank on which the check was drawn would pay the same on presentation.'"

And the following testimony of the secretary of the association was quoted:

"At the time the loan to defendant Denson was made, complainant association had been for some time soliciting subscriptions to stock and receiving applications for loans in the State of Alabama, and had paid a tax or license fee required under the laws of the State of Alabama, for foreign corporations proposing to do business in that State, and defendant's officers supposed and understood that the payment of this fee or tax was the only condition with which it was necessary for them to comply in order to be entitled to do business in that State. Subsequently, however, and some months after the loan to defendant Denson was made, complainant was informed by an attorny in the State of Alabama that the Alabama statutes required foreign corporations doing business in Alabama to designate a local agent on whom process against the association could be served, and also a local place of business in that State. Thereupon complainant promptly designated such local agent and place of business, and continued up to the second of October, 1899, to pay the license tax or fee required of non-resident corporations doing business in Alabama, and to keep a local agent and place of business in that State."

Mr. Justice McKenna delivered the opinion of the Court.

The question presented by the case is, did the loan made by petitioner and the taking for security the note and mortgage under the circumstances presented by the record constitute a doing of business in the State, within the meaning of the constitution and laws of the State?

It was said by the Supreme Court of Alabama, (*Beard* v. *The Union & American Publishing Company*, 71 Ala. 60,) that to constitute a doing of business within the State "there must be a doing of some of the works, or an exercise of some of the functions for which the corporation was created." It was held, however, that receiving a subscription to a newspaper, or collecting the money therefor was not doing business in the State "within the principle." In a subsequent case, (*Dudley* v. *Collier & Pinkard*, 87 Ala. 431,) the court announced that "a loan or borrowing of money by or from" a foreign corporation is a doing of business within the State, and "is an unlawful act, subjecting both the agents and company to a heavy penalty." The provisions of the statute prescribing penalties were considered, and their effect was declared to be not only to punish offenders against the statute but to render their contracts void. Many cases were cited in support of the conclusion as a proper deduction from the imposition of the penalties. And the principle was applied to make illegal a contract with an agent for services rendered in procuring a loan for the use of the corporation.

In *Farrior* v. *New England Mortgage Security Co.*, (88 Ala. 275,) it was said that the constitution prohibited the making of a single contract or the doing of a single act of business by a foreign corporation in the exercise of a corporate function, as well as the engaging in or carrying on its business generally. To the same effect are *Mullins* v. *American Free-*

hold Land Mortgage Co., Id. 280; *Giron* v. *New England Mortgage Security Co.*, 92 Ala. 135; *Sullivan* v. *Sullivan Timber Co.*, 103 Ala. 371.

These cases constitute an interpretation of the constitutional and statutory provisions, and clearly hold that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied with the constitution and statute, and that the contracts hence resulting are illegal and cannot be enforced in the courts.

The petitioner is a building and loan association. Its corporate purpose is to lend money to its stockholders. The respondent Denson was one of its stockholders, and, manifestly regarding the essence of the transactions between them, they constituted a doing of business within the State of Alabama. But, it is insisted, that on account of the form and terms of the instruments and by operation of law the loans must be regarded as having been made in Tennessee. It is said: "The note and mortgage were drawn in Tennessee, and by their express terms were payable there. The note is dated on its face at Chattanooga, Tennessee, and expressly stipulates that it 'is made with reference to and under the laws of Tennessee.'" And further, that the petitioner's part of all the transactions were performed in the State of Tennessee, "and only those acts which the borrower was required to do *as a condition precedent* to the loan of the money to him were performed in Alabama." It is hence deduced that the business done must be regarded as having been done in Tennessee.

Counsel has discussed at some length the situs of contracts and by the law of what place their obligation is determined. We think, however, that the discussion is not relevant. It withdraws our consideration from the constitution and statute of Alabama; and, it is manifest, the contention based upon it, if yielded to, would defeat their purpose. The prohibition is directed to the doing of any business in the State in the exercise of corporate functions; and there can be no doubt that petitioner considered that it was exercising such functions in the State. Its secretary testified that "at the time the loan to defendant Denson was made complainant association had been for some time soliciting subscriptions to stock and receiving applications for loans in the State of Alabama, and had paid a tax or license fee required under the laws of the State of Alabama for foreign corporations proposing to do business in that State, and defendant's officers supposed and understood that the payment of this fee or tax was the only condition with which it was necessary for them to comply in order to be entitled to do business in that State." The application of Denson was presumably solicited as other applications were, and if what was done in pursuance of it did not constitute doing business in the State, the effect would be, as expressed by the Circuit Court of Appeals, that petitioner "and other foreign associations engaged in the same business of loaning money

on real security, may safely flood the State of Alabama with soliciting agents, making all the negotiations for loans, take real estate securities therefor and fully transact all other business pertaining to their corporate functions as though incorporated therein, and yet neither be obliged to have a known place of business or any authorized agent within the State, nor pay any license tax or fee, as required of non-resident corporations doing business therein."

The case of *Fritz* v. *Palmer*, (132 U. S. 282,) does not relieve from the effect of the Alabama decisions and from the necessity of following them. The action was ejectment to recover certain real property in Colorado. The title of one of the parties was derived through the Comstock Mining Company, a Missouri corporation, which, before its purchase of the property, had been engaged in the prosecution of its mining business in the State, but it had not complied with the constitution and statutes of the State prescribing the terms upon which foreign corporations might do business in the State. The constitutional provision was substantially like that of Alabama, but the statutes were materially different, and, besides, there had been no decision of the Supreme Court of Colorado interpreting the statutes. The only penalty expressed in the statutes was the imposition of personal liability upon the officers, agents and stockholders of the corporation for any and all contracts made within the State during the time the corporation was in default. It was held that the fair implication was that "in the judgment of the legislature of Colorado this penalty was ample to effect the objects of the statutes." And it was said that it was not for the judiciary, at the instance of or for the benefit of private parties, to forfeit property which had been conveyed to the corporation and by it to others. *Fritz* v. *Palmer*, therefore, was but the interpretation of a particular statute, and there is not a word in it which denies or questions the power of a State to make void the contracts of a foreign corporation which is doing business in the State in violation of its laws.

It is urged by petitioner that it thought it had complied with the law of Alabama, and that it was not an intentional offender against it, and, therefore, should not be "repelled from court." But the latter consequence has been decided to result from non-compliance with the statute, and we cannot grant an exemption from it. The statute makes no distinction between an inadvertent and a conscious violation of its provisions, and a familiar legal maxim precludes a defense based on that distinction. Nor can the payment of the license fee be urged as a justification for omitting to comply with the statute. Such payment was one condition to be performed by a foreign corporation; the designation of a known place of business and an authorized agent was another, and was of so much importance as to be enjoined by the constitution of the State.

It is contended that this case cannot be distinguished from *Bedford* v. *Eastern Building & Loan Association*, (181 U. S. 277,) and must be ruled by that case.

We think there is a marked distinction. In the Bedford case the contract was legally entered into and was entitled to be enforced. In the case at bar the contract was made in violation of the statute of Alabama, and it can not, therefore, claim the protection given to the contract in the other case.

Decree affirmed.

Mr. Justice HARLAN dissents.

True copy.

Test:

Clerk Supreme Court, U. S.